In The

Supreme Court of the United States

October Term, 1977

No. 77-376

COMMERCE TANKERS CORPORATION and VANTAGE STEAMSHIP CORP.,

Petitioners,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Commerce Tankers Corporation ("Commerce") and Vantage Steamship Corp. ("Vantage") (collectively, "Petitioners") pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered in the above entitled case on April 15, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 553 F.2d 793 (2d Cir. 1977) and is reproduced in the appendix to this

petition at 3a-25a.[1] The opinion of the District Court is reported at 411 F. Supp. 1224 (S.D.N.Y. 1976) and is reproduced at 26a.

JURISDICTION

An order denying a petition for rehearing was entered on June 15, 1977 (64a-65a). The judgment of the Court of Appeals was entered on June 29, 1977 (1a-2a). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in limiting Commerce's recovery against the NMU for the wrongful injunction to the amount of the injunction bond ($10,000) and by excluding Vantage from any recovery?

2. Did the Court of Appeals err in failing to find that Rule 65(c), Federal Rules of Civil Procedure, could not constitutionally be applied, to so limit recovery under the peculiar circumstances of this case?

3. Did the Court of Appeals fail to adhere to this Court's precedent in *Connell Construction Company, Inc. v. Plumbers & Steamfitters Local No. 100,* 421 U.S. 616 (1975) in its instructions to the District Court on remand?

STATEMENT OF THE CASE

1. The Planned Transfer

In the fall of 1970, Commerce's parent, Vernitron Corporation, decided for business reasons to go out of the shipping business. At the time, unlicensed seamen on the two

1. The Appendix to this petition is separately paginated and is referred to herein as "a".

ocean-going United States flag ships owned by Commerce were represented by the National Maritime Union ("NMU"). On December 23, 1970, Commerce sold one vessel to a party with a pre-existing collective bargaining agreement with the NMU and contracted to sell its last remaining vessel, the S.S. Barbara, to Vantage for a price of $2,750,000, with delivery scheduled after February 28, 1971.[2] In January, Vantage chartered the ship to the Standard Oil Company of California ("SoCal") for a period of one year, commencing in March.

2. The Preliminary Injunction

On January 25th, the NMU contacted Vernitron, asserting that the sale to Vantage violated the restraint-on-transfer clause[3] in the NMU collective bargaining agreement and demanding an immediate arbitration of the dispute. On February 8th, a no-witness, no-transcript, 20-minute "proceeding" was held, at which time the contractually designated arbitrator specificallly enforced the NMU clause, although declining to consider issues relating to its legality under federal law. Vantage did not receive formal notice of the arbitration and was not present or represented in the proceeding. The arbitrator's award was made over the objection of Commerce and despite its request for a 72-hour adjournment to present witnesses and brief the issues in dispute.

The next day the NMU commenced a civil action seeking judicial confirmation of the arbitral injunction and obtained, by application[4] before District Court Judge Inzer B. Wyatt, a

2. All dates hereafter are 1971, unless otherwise indicated.

3. The clause has since been so referred to in this litigation and is quoted in full in the opinion of the Court of Appeals (6a).

4. The application was made without notice to Commerce or its regular counsel, and without any notice whatsoever to Vantage, which was not named as a party defendant. *Cf.*, Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.* The NMU gave *telephonic* notice to Commerce's special counsel who had originally spoken to the Union to obtain delay of arbitration.

temporary restraining order enforcing the arbitral award of injunctive relief on the posting of a $10,000 injunction bond. Shortly thereafter, Vantage intervened as a party defendant. On February 16th and 18th, Commerce and Vantage moved before Judge Wyatt to vacate the TRO. After extensive written briefs and oral argument to the Court, Judge Wyatt determined on February 19th to so vacate the restraining order on the grounds that serious questions of first impression arising under the antitrust laws were presented by the NMU's attempt to enforce restraint-on-transfer.

On the night of Monday, February 22nd, Judge Wyatt signed an order in accordance with that determination, conditioned upon the steamship companies posting a financial bond and certain written assurances to the National Labor Relations Board ("NLRB") concerning the jurisdictional dispute. Vantage had already filed an unfair labor practice complaint with the NLRB.[5]

On February 23rd, NMU counsel filed an affidavit seeking a "preliminary injunction" which came to be heard before District Judge Marvin Frankel. At oral argument, Judge Frankel orally "reversed" Judge Wyatt's written determination and "revived" the temporary restraining order blocking the sale. On February 25th and 27th, Judge Frankel issued written restraining orders. On March 2nd, Judge Frankel rendered a decision granting the NMU the preliminary injunction which it sought and further ruling that the $10,000 injunction bond previously issued — a bond which had been issued before Vantage intervened and therefore named only Commerce — be continued in effect. Judge Frankel's decision is reported at 325 F. Supp. 360 (S.D.N.Y. 1971). The petitioners pressed the NLRB to enter the proceeding and ultimately obtained initiation of an NLRB proceeding and reversal and vacation of the

5. The restraint-on-transfer clause was held, in a separate proceeding, to be violative of Section 8(e) of the National Labor Relations Act. *NLRB v. National Maritime Union*, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

preliminary injunction by the Court of Appeals, 457 F.2d 1127 (2d Cir. 1972).

3. Subsequent Events

The sale of the Barbara from Commerce to Vantage was never consummated. Commerce, having been unable to sell the vessel for nearly a year, finally sold it elsewhere and received only $700,000. Commerce also received an additional $700,000 from Vantage as a consequence of the NMU's frustration at the sale. Commerce's losses thus amount to at least $1,350,000 — the difference between the original sale price and the amount finally received. Vantage losses, in addition to the $700,000 it paid Commerce, include claims of more than $2,000,000 consisting of lost profits on the SoCal charter and expenses for paid improvements to the vessel.

4. The Proceedings Below

In the District Court, petitioners, relying on antitrust, secondary boycott, and wrongful injunction theories, each sought damages resulting from the NMU's enforcement of its unlawful clause to frustrate their business transaction. After trial, The Hon. Thomas P. Griesa found that the petitioners' damages were "caused by the injunction," dismissed the antitrust and secondary boycott claims, limited Commerce's recovery to $10,000, the amount of the injunction bond, based upon the so-called "injunction bond rule," and denied any wrongful injunction relief to Vantage.

On appeal, the majority held in pertinent part:

> "We recognize the authority of the injunction bond rule, and we have relied on it ourselves. E.g., In re Spencer Kellogg & Sons, 52 F.2d 129, 134-35 (2d Cir. 1931). But we do not think it applies to the antitrust claim pressed on

> the unique facts of this case. The purpose of the injunction bond rule is to provide protection to a defendant who is under injunction in an equity action, but who ultimately prevails on the merits. The rule, however, does not apply to this action at law for damages arising out of a *per se* antitrust violation." (14a).

Accordingly, the Court adopted the District Court's limitations on petitioners' claims for wrongful injunction, but reversed and remanded to the District Court as to the dismissal of petitioners' claims for damages arising out of the antitrust violation. By this resolution, the courts below have enforced a century-old doctrine on limitation of damages for wrongful injunction without any meaningful examination as to the basis for the rule, its continued applicability in the light of later legislation, or the constitutionality of such application under the peculiar circumstances of this case.

Judge Lumbard, concurring in part and dissenting in part, expressed "considerable doubt [as to] the continued validity of the limitation of recovery for wrongful injunction to the amount of the bond." (20a). Judge Lumbard opined, however, that no purpose would be served by further examination of the question as appropriate recovery should be available for the NMU's violations of the antitrust laws. On the contrary, the majority opinion's instructions to the District Court on remand render it uncertain that "appropriate recovery" will be available. Thus, the time is at hand for final review as to the legal issues arising from the wrongful injunction. Such issues merit review by this Court because of a conflict among the Circuit Courts, the ever-increasing importance of the preliminary injunction to the overall litigation process, and the federal statutory and constitutional issues posed by the instant interpretation of Rule 65 of the Federal Rules of Civil Procedure. In addition, petitioners pray that this Court will grant certiorari to review the instructions on remand on the grounds that such instructions

clearly diverge from a recent precedent of this Court on the complex interaction of the labor laws and antitrust laws.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals erred in limiting petitioners' recovery against the NMU for wrongful injunction to the amount of the injunction bond. The provisions of Rule 65(c) requiring the posting of a bond for security do not explicitly or implicitly establish such a limitation.

In essence, the "injunction bond rule," relied upon by the courts below (1) limits recovery for wrongful injunction to the amount of the bond [see *e.g., International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 147 F.2d 246 (8th Cir. 1945), *cert. denied,* 325 U.S. 852 (1945)]; and (2) limits a cause of action for wrongful injunction to parties named on the bond, rather than all parties wrongfully enjoined [see e.g., *Benz v. Compania Naviera Hidalgo, S.A.*, 205 F.2d 944 (9th Cir. 1953)]. The philosophic rationalization of the rule has been that the damages suffered by the wrongfully enjoined party were the consequence of an error of the Court for which the plaintiff ought not be held accountable in the absence of malicious prosecution. *United Motors Service v. Tropic-Aire,* 57 F.2d 479, 482-83 (8th Cir. 1932). The rule and its purported explanation have been subject to considerable scholarly criticism. See generally, Metzger and Friedlander, "The Preliminary Injunction: Injury Without Remedy?" 29 The Business Lawyer 913 (April 1974); Note, "Interlocutory Injunctions and the Injunction Bond," 73 Harv. L. Rev. 333 (1959); Note, "Recovery of Damages on Injunction Bonds," 32 Columbia L. Rev. 869 (1932).

Close examination of the precedents indicates that the rule limiting the liability of a party which secured a wrongful

injunction to the amount of the injunction bond was born out of two early United States Supreme Court decisions, *Russell v. Farley,* 105 U.S. 433 (1881), and *Meyers v. Block,* 120 U.S. 206 (1887). In the view of petitioners, both the *Russell v. Farley* and *Meyers v. Block* decisions emanated from the judicial division of courts into courts of equity and courts of law. Equity courts were not capable of granting damages. *Bein v. Heath,* 53 U.S. (12 Howard) 168, 178-79 (1851). In that context, this Court carved an exception to the limits of equity court power, such that in order to give complete relief, a court of equity could enter judgment on an injunction bond. *Russell v. Farley, supra.* But, in the absence of an injunction bond, a court of equity was powerless to remedy the wrongful injunction. *Meyers v. Block, supra.*

In 1972, the Third Circuit Court of Appeals extensively reviewed the law and held that in any case involving a labor dispute,[6] the liability of the plaintiff, though not of any surety, for loss, expense, or damage, including attorneys' fees, under Section 7 of the Norris-LaGuardia Act, shall be fixed without regard to the amount of any injunction bond. *United States Steel Corp. v. United Mine Workers,* 456 F.2d 483 (3rd Cir. 1972), *cert. denied,* 408 U.S. 923 (1972). But see *Associated General Contractors v. Illinois Conference of Teamsters,* 486 F.2d 972, 974-75 (7th Cir. 1973). The decision below directly conflicts with the holding of the Third Circuit.[7]

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6. This was clearly a labor dispute within the meaning of the Norris-LaGuardia Act; but the petitioners place no special weight on the provisions of such Act notwithstanding the decision by the Third Circuit.

7. The Third Circuit, in ruling that recovery for wrongful injunction would not be limited to the amount of the bond expressly declined to rule on the entitlement to recovery for wrongful injunction in the absence of a bond. See 456 F.2d at 493. However, surely, if the amount of the bond does not limit recovery for wrongful injunction, the non-existence of a bond should not serve to deprive an injured party of all recovery for its losses. In any event, this case presents the almost unique opportunity for reexamination of both aspects of the rule.

This issue is of substantial significance beyond the limits of this litigation. Despite the apparently mandatory[8] nature of the bonding requirement of Federal Rule 65(c), a number of courts have unequivocally held that the requirement of a bond is discretionary and that in federal practice the District Judge may omit the bond entirely. See *Urbain v. Knapp Bros. Mfg. Co.*, 217 F.2d 810, 815-16 (6th Cir. 1954), *cert. denied,* 349 U.S. 930 (1955). Considered in light of the trend to no-bond preliminary injunctions, particularly evident in cases relating to public interest law, the bond limitation rule poses the important question of whether federal courts ought properly be injected into controversies at a "preliminary" state (when all the evidence is concededly not available to the court) if as a potential consequence of such interference the enjoined party may be forever foreclosed from obtaining adequate relief for its damages from the party which secured the injunction.

In every other legal context, a "security" device "secures" the protected party against default by the one who posts security. Of course, as to the surety, its liability is limited to the amount of the bond. The question here is the obligation of the *principal,* not of the surety. Normally, the amount of the bond will be adequate to compensate the party wrongfully enjoined for its damages, because the court issuing the injunction will fix the bond mindful of the possibility of error on its part. When this matter was before Judge Frankel, Commerce requested that in the event an injunction was issued, a bond of $2,750,000 be

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8. Rule 65(c) of the Federal Rules of Civil Procedure provides: "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer of agency thereof." Are the United States and its officers and agents "exempt" from liability for wrongful injunctions or is the provision of 65(c) excusing such parties from the bond requirement merely an indication that Congress felt it unnecessary for the Government to demonstrate its financial worthiness?

required of the Union. Judge Frankel was not mindful[9] of the possibility of error and fixed the bond at a nominal $10,000. Subsequently, by motion before the Court of Appeals under Rule 8 of the Federal Rules of Appellate Procedure, Commerce asked that the injunction be lifted or the bond be increased to a sum reasonable in relation to the amount of its possible losses. Commerce sought the additional bond "as security." No party cited the injunction bond rule or then claimed that the bond set by Judge Frankel was a limit against or bar to greater recovery upon full trial.[10] The NMU opposed Commerce's Rule 8 application, and it was denied "without prejudice." It is impossible to believe that the NMU's success in these temporary maneuvers can in any way insulate it from the damage the NMU would otherwise owe to the petitioners, yet the decisions below would appear to have that effect.[11]

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9. The Court of Appeals has characterized Judge Frankel's decision as having given "short shrift" to the legal arguments of Commerce and Vantage (8a). It has also been proven beyond further question that Judge Frankel's summary characterizations of the conduct and motives of the steamship companies were unfounded.

10. Indeed, the NMU never pleaded an "injunction bond" defense to either Commerce's counterclaims or Vantage's complaint, but was permitted to raise it at trial.

11. In the District Court, the NMU conceded that had it stopped the transfer by acts of self-help, the Union would have been liable to the steamship companies for the full amount of the monetary damages they suffered. Section 303 of the Labor Management Relations Act, 29 U.S.C. §187. The District Court held, and the Court of Appeals affirmed, that "resort to court" for enforcement *pendente lite* of a void hot cargo agreement is not actionable under Section 303. See *Local Union No. 48 Sheetmetal Workers International Ass'n. v. Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964). Thus, the anomaly in this case is that *if* Commerce had obeyed the NMU clause or caved in to the initial NMU threat to enforce the clause, the petitioners would have the right to full recourse from the Union. But because the NMU got its arbitrator to require literal compliance therewith over Commerce's objection, the Union's pre-existing obligations for obtaining and enforcing this illegal clause have "disappeared."

In short, petitioners were wrongfully stopped from consummating their private business transaction by a party which was demanding that its claimed private rights be accorded preferential treatment. Judge Frankel erroneously granted the NMU's motion, and erroneously provided for a bond of $10,000, or roughly one-quarter of one percent (.0025%) of the actual damages ultimately sustained. The injunction was reversed. The insufficiency of the bond is obvious. Equity demands that the Union be held accountable for its wrongs without regard to the amount of the bond or the precise parties named beneficiaries thereof.

II.

The Court of Appeals erred in failing to consider whether under the facts of this case, imposition of the injunction bond limitation deprived petitioners of their constitutional right to procedural due process.

The Fifth Amendment to the Constitution provides:

> "No person shall be . . . deprived of life, liberty or property without due process of law . . . ."

This language provides a constitutional guarantee of the prior application of procedural due process requirements to any situation involving the taking of a person's property. Determinations that dispose of property with finality must be preceded by adequate notice and opportunity for a fair hearing. *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

Fuentes, supra, is particularly analogous to the case at bar. In order to replevy goods in a debtor's possession prior to a judicial determination of the parties' legal rights, a Florida statute required a bond be posted in the amount of double the

value of the property to be taken to secure the defendant in the event that the seizure be found unjustified. Justice Stewart's opinion emphasized that the bond required of the plaintiffs was not a substitute for a prior hearing. Petitioners contend that if recovery for wrongful injunction is limited to the $10,000 bond fixed by Judge Frankel, that limitation would deprive petitioners of their constitutional right to procedural due process as they were never afforded a constitutionally-acceptable hearing, either before the arbitrator who first issued the injunction, or before Judge Frankel, who reinstated the injunction and the nominal bond. The constitutional question posed by this case is: if a more-than-adequate bond cannot be a substitute for a temporary taking of property without due process of law, how is it possible that a less-than-adequate bond can be a permanent substitute for recompense for the wrongful taking of property shown to have been without due process?

The Court of Appeals did not expressly consider the due process issue, apparently on the theory that "appropriate relief" would be available on the antitrust claim. The petitioners believe that the constitutional issue is of substantial importance and the due process violations so serious that they ought not be submerged beneath some new and uncertain restatement of the law regarding union liability for participation in group boycotts. The abuse of procedural due process in this case was, we submit, caused by the NMU as follows:

(1) In the arbitration, the NMU proceeded without any written statement of its claim; Vantage was not notified of or represented at the arbitration; Commerce was denied the opportunity, urgently requested, to prepare and present witnesses and prepare briefs which would have brought the issues into focus; Commerce was not permitted a hearing to confront or cross-examine the Union's witnesses since no witnesses at all were called; and the award of preliminary

injunction was entered after a 20-minute proceeding at which no evidence whatever was adduced.[12]

(2) In the District Court, the NMU applied for the TRO without notifying Vantage or naming it as a party defendant, and without notifying Commerce in a proper procedural manner (see note 4 *supra*); and then when the TRO was conditionally vacated, the NMU applied before a different federal judge for a "preliminary injunction" again without observing the required "formalities" of a notice and hearing requirement.[13] Indeed, the preliminary injunction was issued without an evidentiary hearing on the issues of fact or the amount of the bond. For a similar instance of unjudicious and informal proceedings resulting in an erroneous order of preliminary injunction and inequitably low

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12. Characteristic of the arbitration "procedure" was the following: At the meeting, NMU counsel handed the arbitrator a "form" contract which it claimed Commerce had signed. Only years later at the trial of this case did NMU counsel admit that the key provision of the form — *to wit*, the one being arbitrated — had at the time of the arbitration *never* been signed by Commerce or any other employer, and that the restraint-on-transfer agreement had been made by oral arrangement with an industry association and the form contract simply mailed to independents, such as Commerce, without requesting or requiring signature. This Court has held that an employer may simply ignore an illegal hot cargo clause which it has agreed to contractually. See *Local 1976 United Bhd. of Carpenters v. N.L.R.B.* (Sand Door), 357 U.S. 93, 105-06 (1958). Enforcement of the "injunction bond limit" thus has the curious result of "punishing" Commerce (and Vantage) for a contract clause they never signed and never approved, and which, if Commerce had signed and approved, was *void* in any event.

13. Federal Rule 6(d) requiring five days notice of motion applies to a preliminary injunction. *Marshall Durbin Farms, Inc. v. National Farmers Organization*, 446 F.2d 353, 358 (5th Cir. 1971). Technically, the NMU had a motion to confirm the arbitration award which was returnable before Judge Frankel. After issuing the TRO, Judge Frankel wrote that confirmation of the award was "technically inappropriate" and with the "consent" of the parties he was treating it as a motion for preliminary injunction. The "consent" referred to apparently relates to unrecorded oral argument in the heat of motion practice. In fact, neither petitioner ever consented or waived their objection to the NMU's multitude of improper procedures.

"bond" requirement, see *First-Citizens Bank & Trust Company v. Camp*, 432 F.2d 481 (4th Cir. 1970).

In sum, the injunction was granted, and the bond was set in a manner wholly failing to meet the minimal standards for procedural due process. At the very least, petitioners are entitled to a thorough examination of the due process issues which they have raised. Failing that, this case will stand for the proposition that procedural due process is not a condition of the injunction bond limit.

III.

The Court of Appeals erred in instructing the District Court, on remand, to make detailed findings on the anti-competitive effects of the restraint-on-transfer clause, or in the event that the rule of reason inquiry should apply, on the anti-competitive purposes of the clause.

In the maritime industry a unique rule of labor relations developed over many years and applicable to most employers, required each employer to use a crew of seamen represented by a single union on its entire fleet of vessels, including newly acquired vessels. *Moore-McCormack Lines, Inc.*, 139 N.L.R.B. 796 (1962); *National Maritime Union* (Overseas Carriers Corp.), 174 N.L.R.B. 216 (1969).

In 1968-70, a group of AFL-CIO affiliated maritime unions obtained the agreement[14] of the bargaining agent for the

14. The first such agreement was made by eight employers as a midterm modification to the collective bargaining agreement of the Marine Engineers Beneficial Association. The extension of the clause to the remainder of the industry thereafter became "a foregone conclusion" and was, in fact, included in the printed version of the NMU's 1969 agreement. Although the proofs at trial showed that every other clause of the NMU's 1969 agreements had been carefully signed by each employer, the restraint-on-transfer clause was neither signed by the associations nor submitted to any independent employer for signature until six months *after* Judge Frankel's decision.

principal employers' associations, that those employers would enforce the restraint-on-transfer agreements, which precluded sale of their United States flag vessels to competitors in the coastwise trade except to purchasers who would retain the same unions. As to the unlicensed seamen alone, the unquestioned object and effect of this clause was to make employers with fleetwide agreements with unions other than the NMU "ineligible" to buy vessels owned by NMU contracted parties. At the time, approximately half of the U.S. flag operators, including Vantage, had fleetwide agreements with competing seamen's unions.

As a consequence, Commerce, a willing seller, was prevented from transferring the business of operating the vessel Barbara in the coastwise trade to Vantage, a willing buyer, solely because Vantage was a member of a class with which the NMU and certain affiliated employers had agreed not to do business. Ordinarily, group boycotts are so pernicious a practice that upon proof of their existence, no explanation will be heard in defense of a challenge thereto under the antitrust laws. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

But, because the restraint arises in a labor contest, the majority would remand for detailed findings from the District Court on the anti-competitive effects[15] of the restraint-on-transfer clause, or in the event that the rule of reason inquiry should apply, on the anti-competitive purposes of the clause. Petitioners believe that this direction gravely misapprehends the state of the developing law concerning group boycotts in a labor context.

If a "rule of reason" approach is to be employed, the competitive interests which are to be balanced must be those, on the one hand, favoring collective bargaining with those, on the other hand, favoring free competition in the business market.

15. Judge Lumbard correctly concluded that the anticompetitive effects of the restraint-on-transfer clause were apparent from the record (24a).

See *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local No. 100,* 421 U.S. 616, 622 (1975). In place of the *Connell* test, the Second Circuit substituted a directive that inquiry be made into the NMU anti-competitive "purposes." Such direction is clearly erroneous insofar as it suggests that proper "purposes" may shelter[16] a labor party from antitrust liability for its acts in sponsoring a multi-employer group boycott. It is not the Union's goals, but its methods that determine antitrust liability. *Connell,* 421 U.S. at 625.

In conclusion, petitioners assert that under the settled law of *Connell,* this case should have been remanded to the District Court solely for an assessment of damages against the NMU. But, if further factual findings by the District Court are required, the appropriate instructions on remand should call solely for the balancing of the interests of collective bargaining between the NMU and Commerce, on the one hand, and free competition in the relevant business market, on the other hand.

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16. The majority opinion also indicates that the NMU conduct may be "sheltered" because the restraint-on-transfer clause was included in an otherwise lawful collective bargaining agreement and that this issue is not necessarily determined by the prior holding that the clause was an unlawful secondary boycott within the meaning of §8(e) of the NLRA (17a). Even if *arguendo* not every union agreement which fails to meet the "work-preservation" standards of *National Woodwork Mfrs. Association v. NLRB,* 386 U.S. 612 (1967) will necessarily result in union liability under the antitrust laws, here again the majority of the Court of Appeals misconstrues this Court's holding in *Connell.* To the same extent, it was true that Local 100 had no interest in representing *Connell's* employees, the NMU had no interest in representing *Vantage's* employees.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ D. DAVID COHEN
s/ MARTIN C. SEHAM

SURREY, KARASIK, MORSE & SEHAM
Attorneys for Petitioners

APPENDIX

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Filed Apr. 15, 1977
Daniel Fusaro, Clerk

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of April one thousand nine hundred and seventy-seven.

Present:

HON. J. EDWARD LUMBARD

HON. WILFRED FEINBERG
Circuit Judges

HON. ALBERT W. COFFRIN
District Judge

National Maritime Union of America, AFL-CIO,

Plaintiff-Appellee

v.

Commerce Tankers Corporation,

Defendant-Counterclaimant-Appellant

and

Judgment of the Court of Appeals

Vantage Steamship Corp.,

Intervening Defendant-Appellant.

Vantage Steamship Corp.,

Plaintiff-Appellant

v.

National Maritime Union of America, AFL-CIO

76-7217
76-7223

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part, reversed in part and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by
Arthur Heller
Deputy Clerk

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 179-80—September Term, 1976.

(Argued January 19, 1977 Decided April 15, 1977.)

Docket Nos. 76-7217, 7223

COMMERCE TANKERS CORPORATION,

Defendant-Counterclaimant-Appellant,

—and—

VANTAGE STEAMSHIP CORPORATION,

Intervening Defendant-Appellant,

—against—

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff-Appellee.

VANTAGE STEAMSHIP CORPORATION,

Plaintiff-Appellant,

—against—

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Defendant-Appellee.

Opinion of the Court of Appeals

Before:

LUMBARD, FEINBERG, *Circuit Judges*, and
COFFRIN, *District Judge.**

Appeal from judgment of the United States District Court for the Southern District of New York, Thomas P. Griesa, *J.*, dismissing complaint alleging violations of federal antitrust and labor laws, and limiting recovery for wrongful injunction to amount posted for injunction bond.

Affirmed in part and reversed in part.

D. DAVID COHEN, Great Neck, N.Y., *for Defendant-Counterclaimant-Appellant.*

MARTIN C. SEHAM, New York, N.Y. (Surrey, Karasik, Morse and Seham; Fred C. Klein, David F. Devine, on the brief), *for Intervening Defendant-Appellant Vantage Steamship Corporation.*

CHARLES SOVEL, New York, N.Y. (Phillips & Cappiello), *for Plaintiff-Appellee.*

FEINBERG, *Circuit Judge:*

Over six years ago, appellant Commerce Tankers Corporation for pressing economic reasons attempted to sell its last remaining vessel to Vantage Steamship Corp., also appellant here. Appellee National Maritime Union (NMU), which represented the seamen on the vessel, objected to the sale because Commerce had not obtained a commitment from Vantage to continue the NMU as bargaining repre-

* Of the United States District Court for the District of Vermont, sitting by designation.

sentative, in accordance with a provision of NMU's collective bargaining agreement with Commerce. This began a flurry of litigation over a period of several years among Commerce, Vantage, NMU and the National Labor Relations Board (NLRB), in combinations and permutations set forth below.

At first NMU blocked the sale, obtaining an arbitration award and an injunction in the United States District Court for the Southern District of New York. *National Maritime Union* v. *Commerce Tankers Corp.*, 325 F. Supp. 360 (S.D.N.Y. 1971). That injunction, however, was reversed after the Regional Director of the NLRB, on an application under § 10(1) of the National Labor Relations Act, alleged that there was "reasonable cause to believe" that the clause invoked by the NMU violated section 8(e) of the National Labor Relations Act, see *McLeod* v. *National Maritime Union*, 457 F.2d 1127 (2d Cir. 1972), a preliminary determination later confirmed by the Board and by this court in *NLRB* v. *National Maritime Union*, 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974). Commerce and Vantage claimed that they suffered damages of $1,550,000 and $2,230,000, respectively, due to NMU's conduct, which they alleged violated not only the National Labor Relations Act, but also the Sherman Act.[1] After a non-jury trial in the United States District Court for the Southern District of New York, Judge Thomas P. Griesa found that the proximate cause of any damage was the district court injunction against the sale. The judge therefore limited Commerce's recovery to the $10,000 injunction bond posted by NMU in the litigation below and denied Vantage any relief whatever, since it was not covered by the bond. 411 F. Supp. at 1225. This appeal fol-

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1 Appellants also alleged, inter alia, violation of the New York antitrust law, wrongful injunction, and tortious interference with contract. Only the second of these claims is pressed here.

lowed. For reasons set forth below, we reverse and remand for further consideration of appellants' claim under the Sherman Act.

I

The background of this litigation is set forth in our two prior opinions cited above, and we will try not to repeat here anything but the essential facts. The contract clause in question, which is reproduced in the margin,[2] was contained in a multiemployer NMU collective bargaining agreement, to which Commerce was a party. The clause provided in substance that if Commerce sells a ship to an American flag shipper not already under contract with the NMU, the ship will be sold with a crew provided by the NMU, and Commerce will obtain from the purchaser "a written undertaking" to abide by the NMU contract. In the fall of 1970, Commerce's parent, Vernitron Cor-

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2 Article I, section 2, which is entitled "Sale and Transfer of Vessels," provides:

> (a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term "transfer" shall be construed to include any chartering of a vessel by the Company.
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> (b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as herein-above provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such personnel under this Agreement.

poration, decided for business reasons to go out of the shipping business. On December 23, 1970, Commerce contracted to sell the S.S. Barbara, an ocean-going tanker, to Vantage for a price of $2,750,000, with delivery scheduled for February 28, 1971. The contract did not contain any provision regarding "the complement of employees" to be furnished by the NMU; nor did Commerce obtain from Vantage the undertaking with the NMU called for by paragraph (b) of the restraint-on-transfer clause. See note 2, supra. At the time, Vantage could not properly have given such an undertaking, since it was party to a conflicting agreement with the Seafarers International Union of North America (SIU), a rival maritime union. In January 1971, Vantage chartered the ship it had contracted to purchase to the Standard Oil Company of California (SoCal) for a period of one year, commencing on March 5, 1971.

At this point, furious activity ensued. The NMU demanded of Commerce and Vantage that Vantage accept the NMU as the bargaining agent of the unlicensed seamen employed aboard the ship. The SIU threatened to strike all Vantage vessels if it ceased using the SIU hiring hall to obtain its unlicensed seamen. Vantage threatened to sue Commerce if it did not deliver the S.S. Barbara in accordance with its contract. The NMU commenced and won a labor arbitration, at which the arbitrator did not consider the legality of the restraint-on-transfer clause; the award enjoined the sale of the vessel without compliance with the clause. The next day, NMU began an action against Commerce in the United States District Court for the Southern District of New York for confirmation of the award. A week later, Vantage intervened as a party defendant and also filed unfair labor practice charges with the NLRB against the NMU and Commerce. After some other skirmishing, Judge Frankel in early March 1971

granted a preliminary injunction against the sale unless the contested clause were observed. The arguments of Commerce and Vantage that the clause was illegal were given short shrift, *National Maritime Union* v. *Commerce Tankers Corporation*, supra, 325 F. Supp. at 364-65, and the court required NMU to post only a $10,000 bond. Both Commerce and Vantage appealed.

At about this time, Vantage's charter with SoCal was cancelled due to "union problems." Shortly thereafter, Commerce advised the NMU that all efforts to obtain a United States flag purchaser had been unsuccessful and Commerce asked the NMU to drop its objection to the transfer, offering to drop its legal attack on the clause. The NMU refused, saying that it "would not gamble that the ship might go SIU."

In late May 1971, the Regional Director of the NLRB issued a complaint against the NMU and sought a § 10(1) injunction against enforcement of the restraint-on-transfer clause. The NLRB's motion was heard along with a motion by Commerce to vacate the earlier preliminary injunction against it, in view of the intervening NLRB complaint. In July 1971, Judge Croake denied both motions, but it appears that were it not for the jurisdictional problem posed by the earlier appeal of Commerce and Vantage, the judge would have vacated the injunction obtained by the NMU.[3] The NLRB appealed from the order refusing a § 10(1) injunction.

By notice of motion dated July 21, 1971, Commerce moved in this court to vacate the NMU injunction against the sale of the vessel, or, in the alternative, to increase

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3 *McLeod* v. *National Maritime Union*, 329 F. Supp. 151, 160 (S.D.N.Y. 1971). Judge Croake's original opinion vacated the preliminary injunction. The judge thereafter decided, however, that since the issue was the subject of a pending appeal, he should not, as a matter of discretion, express any opinion on the subject. The opinion was revised accordingly.

the bond to be posted by the NMU to $2,750,000. Commerce advised the panel then sitting of the NLRB complaint and of various additional financial exigencies[4] and argued strenuously that at least the NMU "should be obliged to post a bond to cover the full purchase price of the vessel so that Commerce . . . . will not be left in a situation in which recovery against any of the other parties cannot be readily accomplished." The NMU's position was that a large bond was "singularly inappropriate . . . in view of the absence of any meaningful defense to the merits of the action [by the NMU against Commerce]." The panel denied Commerce's motion, but expedited the appeal. Thereafter, another panel reversed the rulings of the district court, vacating the NMU injunction and granting the NLRB a § 10(1) injunction. 457 F.2d 1127. Eventually, the NLRB completed the unfair labor practice proceeding and found that the NMU had violated § 8(e) of the Labor Act. The NLRB sought enforcement of its order, which we granted. 486 F.2d 907.

II

This background brings us to the litigation now before us. From the start, Commerce—later joined by Vantage—has claimed that the NMU's restraint-on-transfer clause was illegal and should not be enforced, and that the NMU was liable to it for damages. Commerce's damage claims were pressed in the form of counterclaims in the suit by NMU against it. Vantage brought its own action in October 1972 against the NMU and Commerce. In June 1973,

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4 Thus, the affidavits in support of the motion pointed out that Commerce had been directed by an arbitration award that it had obtained against Vantage, see 486 F.2d at 910 and n.3, to sell the S.S. Barbara in order to minimize damages, that the only oustanding offer at the time was $1,300,000 from a foreign flag operator, and that Vantage said it was still willing to buy the ship for $2,750,000 if it had the "express right to operate SIU."

pursuant to a settlement agreement between Vantage, Commerce and Vernitron, the action was discontinued against Commerce and Vernitron. After our reversal of the injunction obtained by the NMU in its action, Commerce's counterclaims against the NMU in that suit and Vantage's action against the NMU were consolidated and tried without a jury before Judge Thomas P. Griesa. The trial lasted over two weeks; 15 witnesses testified and there were over 1500 pages of transcript.

Commerce and Vantage argued that the NMU was liable for damages on a number of theories. First, the NMU violated Section 1 of the Sherman Act, 15 U.S.C. § 1, in two ways described by the district judge as follows: "(1) That the restraint on transfer clause involved a group boycott against certain potential purchasers of vessels and therefore constituted a *per se* violation; and (2) that the sale and transfer clause was the result of a combination or conspiracy between NMU and large shipping companies to enhance their competitive and financial position at the expense of smaller companies such as Commerce." 411 F. Supp. at 1229. Second, the NMU was liable under section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, which by its terms incorporates section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), both of which are reproduced in the margin.[5] Third, Com-

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5 Section 187 reads:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

merce and Vantage relied on various other alleged bases of liability: The contract clause violated New York General Business Law, § 340, known as the Donnelly Anti-trust Act; the NMU wrongfully induced breach of the contract between Commerce and Vantage for the sale of the S.S. Barbara; and the NMU obtained a "wrongful injunction."

Judge Griesa decided all of these claims on the merits except the very first of the two federal antitrust claims. On the second antitrust claim, the judge held in a lengthy opinion that the evidence did not support the view that the restraint-on-transfer clause was the result of a "con-

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Section 185(b)(4) reads:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> . . .
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> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . .

The "subsection (e)" referred to above is the same section 8(e) which the NLRB and then this court found that the NMU had violated by the restraint-on-transfer clause. 486 F.2d 907.

spiracy between the NMU and large shipping companies to enhance their competitive . . . position at the expense of smaller companies . . . ." The judge also ruled that even though the clause violated section 8(e) of the Labor Act, the NMU was not liable under 29 U.S.C. §§ 158(b)(4) and 187. The former section provides that it shall be an unfair labor practice for a labor union "to threaten, coerce, or restrain any person" with "an object" of "forcing or requiring any employer" to enter into a prohibited agreement or "forcing or requiring any person . . . to cease doing business . . ." with anyone else. The judge held that the NMU did not coerce Commerce into signing the agreement containing the restraint-on-transfer clause. Nor did the NMU coerce Commerce into maintaining the clause, since the NMU did not "strike or threaten to strike" to enforce the provision, but instead "went to arbitration and then to court, . . . [and] resort to a court for a judicial remedy is not coercion." 411 F. Supp. at 1238. Accordingly, the judge found that the NMU did not violate section 8(b)(4) of the Labor Act and therefore appellants could not recover under 29 U.S.C. § 187. With regard to the other asserted theories of liability, the judge held that the New York State antitrust law was inapplicable, on the authority of *Connell Construction Co.* v. *Plumbers and Steamfitters Union No. 100*, 421 U.S. 616, 635-37 (1975), that the NMU was not liable for wrongful inducement of breach of contract because "the proximate cause of the asserted injuries was the preliminary injunction, and the remedy of Commerce and Vantage is limited to the injunction bond," 411 F. Supp. at 1240, and that the NMU's liability for the "wrongful injunction" was limited to the $10,000 bond posted for the benefit of Commerce only.[6]

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6 Perhaps through oversight, the bond did not cover Vantage.

The only claim that the judge did not decide on the merits was that "the restraint-on-transfer clause was a group boycott against certain potential purchasers of vessels and therefore constituted a per se violation" of the Sherman Act. 411 F. Supp. at 1229. Judge Griesa recognized that this claim raised the preliminary issue whether the clause could be considered exempt from the antitrust laws after the Supreme Court decision in *Connell,* supra. But he decided that it was not necessary to reach that issue, because even if the clause were subject to the antitrust laws and did violate them, the violation would not be "the proximate cause" of the injuries to Commerce and Vantage. The judge found instead that:

> The proximate cause of the delay and final frustration of the S.S. Barbara transactions was the preliminary injunction issued by Judge Frankel in a case admittedly involving close and difficult questions of law. The problem created by the injunction was compounded by the long delay of Commerce and Vantage in seeking an appellate remedy.

411 F. Supp. at 1239. Accordingly, the judge denied recovery "on any theory of antitrust violation." Id.

III

Judge Griesa cited no authority for the view that one who commits a per se violation of the Sherman Act can be insulated from liability by the injunction bond rule. That rule has its origin in early equity practice. The chancellor had limited authority to award damages directly, but had broad discretion to frame orders granting injunctions. See generally 1 J. Pomeroy's Equity Jurisprudence §§ 1-39, 237(e) (5th ed. 1941). The practice grew up of conditioning the grant of a preliminary injunction on a

plaintiff's agreement to post a bond to cover any damages that might result if it were later determined that plaintiff was not entitled to an injunction. See *Russell* v. *Farley*, 105 U.S. 433 (1881). The plaintiff, in effect, consented to liability up to the amount of the bond, as the price for it. Otherwise, plaintiff could be found liable for damages only on the theory of malicious prosecution, an action at law. See *Benz* v. *Compania Naviera Hildago*, 205 F.2d 945, 948 (9th Cir. 1953); 7 Moore's Federal Practice ¶ 65.10[1] at 65.98-99.

We recognize the authority of the injunction bond rule, and we have relied on it ourselves. E.g., *In re Spencer Kellogg & Sons*, 52 F.2d 129, 134-35 (2d Cir. 1931). But we do not think it applies to the antitrust claim pressed on the unique facts of this case. The purpose of the injunction bond rule is to provide protection to a defendant who is under injunction in an equity action, but who ultimately prevails on the merits. The rule, however, does not apply to this action at law for damages arising out of a per se antitrust violation. Had Commerce and Vantage brought their actions before the NMU's suit to enforce the restraint-on-transfer clause, their recovery would not have been barred by the intervening wrongful injunction, nor would their damages have been limited to the amount of the bond. We do not believe that their rights are altered because Commerce asserted its antitrust claims as counterclaims in the suit against it, or because Vantage intervened as a defendant in that action and brought its own action for damages after the NMU obtained its wrongful injunction.

The NMU argues that it cannot be held liable even if its restraint-on-transfer clause violated the antitrust laws because the district court injunction was a "superseding cause" and because good faith resort to the courts cannot be a basis for liability, citing, e.g., *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127

(1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 669-70 (1965); and *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-11 (1972). But those cases do not stand for the proposition that a group boycott that is illegal under the antitrust laws can be immunized from liability by a later law suit to enforce it. Indeed, the language in them indicates to the contrary.[7]

It appears that the district judge was led astray by applying the wrong standard for proof of damages in antitrust cases. Proximate cause for an antitrust violation is based on the statutory requirement that the injuries occur "by reason of" the antitrust violation. 15 U.S.C. § 15. We have described the test as

> a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a "material cause" of or a "substantial factor" in the occurrence of the damage.

Billy Baxter, Inc. v. *Coca-Cola Company*, 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971) (citations omitted). By this standard, the execution of the disputed clause and the NMU's determined efforts to enforce it were the proximate cause of injury to appellants, and the notion of superseding cause urged on us by the NMU on appeal is simply inapplicable. Similarly, we have emphasized that the right to recovery under the antitrust laws is given to those in the "target area" of the violation. *SCM Corp.* v. *Radio Corporation of America*, 407 F.2d 166, 171 (2d Cir.),

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7 Petitioners, of course, have the right of access to the agencies and courts to be heard .... That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.

It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. ...

404 U.S. at 513-14. (Footnote omitted). See also 365 U.S. at 136-37.

cert. denied, 395 U.S. 943 (1969); *Calderone Enterprises Corp.* v. *United Artists Theater Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972). Vantage, and other potential buyers of vessels, were the targets of the restraint-on-transfer clause.

Finally, we regard the district judge's emphasis on "the long delay of Commerce and Vantage in seeking an appellate remedy" as misplaced. Even if there had been an inexcusable delay, that would be irrelevant to NMU's antitrust liability under the tests referred to above. But even more important, there was no undue delay in seeking appellate relief in this unusual case. After the district court enjoined the sale in March 1971 and an appeal was taken to this court in early April, Commerce and Vantage frantically sought an immediate remedy at the NLRB by pressing the § 8(e) unfair labor practice charge. This was the most effective way of demonstrating that the district court injunction had been improper, and this course proved to be successful. Moreover, as soon as the NLRB issued its complaint on May 24, 1971, Commerce sought to vacate the injunction first in the district court and then in this court, and argued, in the alternative, for an increase in the NMU's bond. Under the circumstances, appellants followed a sensible course, and the NMU's efforts, successful at the time, to keep the injunction in force and the bond at an inadequate figure, strengthen rather than weaken, appellants' equitable position now.

We thus conclude that the district judge committed error in holding that no damages (above the $10,000 bond) could be proved on the claim of a group boycott antitrust violation and in failing to rule on the substance of that claim. The obvious remedy for that error is to remand the case to the district court for it to consider appellant's first antitrust claim on the merits. Appellants, however, ask us to bypass that procedure and to hold that the re-

straint-on-transfer clause would not be exempt from the antitrust laws under the standards established by *Connell*, supra, and that the agreement constitutes a group boycott and is illegal per se under section 1 of the Sherman Act. See *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Both these assertions raise extremely complex and significant questions on the interaction between the federal labor and antitrust laws. The accommodation of the conflicting policies reflected in these laws has aptly been called "a troublesome and unruly issue." See Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965). *Connell* indicates that a "nonstatutory" exemption from the antitrust laws in this case, see 421 U.S. at 622, turns upon whether the restraint-on-transfer clause was a "direct restraint on the business market . . . that would not follow naturally upon the elimination of competition over wages and working condition," id. at 625, and whether the inclusion of the clause in "a lawful collective-bargaining agreement" shelters the NMU because of the "federal policy favoring collective bargaining." Id. at 626. See generally St. Antoine, Connell: Antitrust Law at the Expense of Labor Law, 62 Va. L. Rev. 603 (1976); Note, Supreme Court Term—1974, 89 Harv. L. Rev. 234 (1975). And we do not believe that our prior holding that the clause violated § 8(e) necessarily determines that antitrust issue, although it lends support to appellants' position. And even if the "nonstatutory" exemption does not apply, there is at least a substantial question whether a per se approach under the antitrust laws is applicable in the case of a non-exempt labor activity.[9] See *Mackey* v. *National Football League*, 543 F.2d

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9 This brings us to the question of antitrust liability when union activity is held to be non-exempt. The principal danger of these recent rulings is that a finding of antitrust liability will automatically be made whenever the challenged conduct is held to be non-

606 (8th Cir. 1976), cert. filed, 45 U.S.L.W. 3511 (Jan. 25, 1977); see generally McCormick, Group Boycotts—Per Se or Not Per Se, That Is the Question, 7 Seton Hall L. Rev. 703 (1976) (on the complexity of the per se approach to group boycotts in general). It would, however, be inappropriate for us to decide these issues now without further findings from the district court and briefs on the questions from both parties.[9] See *Connell*, supra, 421 U.S. at 637. At this point, we are without detailed findings from the district court on the anti-competitive effects of the restraint-on-transfer clause, or in the event that the rule of reason inquiry should apply, on the anti-competitive purposes of the clause.[10] We therefore remand to the dis-

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exempt. This would be a *per se* approach with a vengeance. Arrangements may fall outside the scope of mandatory bargaining and yet have no adverse effect on competition. We still must find whether the agreement restrains trade and whether the restraint is unreasonable. A fair reading of *Jewel Tea* [*Meat Cutters* v. *Jewel Tea Co., Inc.*, 381 U.S. 676 (1965).] satisfies me that the Court intended that there be a full-scale rule of reason inquiry in every instance in which a non-exempt activity is claimed to be in violation of antitrust.

Handler, Labor and Antitrust: A Bit of History, 40 Antitrust L.J. 233, 239-40 (1971). Cf. *Jacobi* v. *Bache & Co., Inc.*, 520 F.2d 1231, 1238-39 (2d Cir. 1975), cert. denied, 423 U.S. 1053 (1976).

9 On appeal, the NMU's brief did not discuss the antitrust claim at issue here, presumably because the district court did not reach it. Also, in their complaint and their briefs in this court, Commerce and Vantage have argued that the alleged group boycott was illegal per se. If, on remand, the district court determines that the rule of reason theory should apply, appellants should be allowed to press their claim of a group boycott antitrust violation under that theory.

10 We realize that the district court has already determined that the restraint-on-transfer clause was not the result of a conspiracy between the NMU and the large shipping companies to enhance their competitive position. Our remand on the issue of an illegal group boycott does not disturb that finding, but by the same token, the finding does not foreclose full examination of appellants' group boycott claim. We note that in *Connell*, "[t]here was no evidence that Local 100's organizing campaign was connected with any agreement with members of the multi-employer bargaining unit . . . ." 421 U.S. at 625 n.2. The Court none-

trict court for consideration of the merits of the first antitrust claim.

IV

We turn now to the district court's dismissal of appellants' claim under § 303 of the Labor Management Relations Act, 29 U.S.C. § 187, see note 5, supra, and its limitation of NMU's liability for wrongful injunction to the amount of the injunction bond. With respect to the claim under § 303, we agree with the judge's determination that "resort to the courts" is not a threat, coercion or restraint under § 8(b)(4)(ii), 29 U.S.C. § 158(b)(4)(ii). See Retail Clerks Local 770 (Hughes Market, Inc.), 218 N.L.R.B. No. 84 (1975); cf. *Local Union No. 48* v. *Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964). Similarly, the judge correctly limited Commerce's recovery for wrongful injunction to the $10,000 injunction bond posted by NMU. See *Associated General Contractors* v. *Illinois Conference of Teamsters*, 486 F.2d 972, 974-75 (7th Cir. 1973); *International Ladies Garment Workers Union* v. *Donnelly Garment Co.*, 147 F.2d 246 (8th Cir.), cert. denied, 325 U.S. 852 (1945); but see *United States Steel Corp.* v. *United Mine Workers*, 456 F.2d 483 (3d Cir.), cert. denied, 408 U.S. 923 (1972).

Accordingly, we affirm the court's dismissal of appellants' claims under § 303 of the Labor Management Relations Act and its limitation on the recovery for wrongful injunction, but reverse its dismissal of appellants' claim of a group boycott in violation of section 1 of the Sherman Act and remand for further consideration.

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theless considered the multiemployer bargaining agreement as "relevant in determining the effect that the agreement between Local 100 and Connell would have on the business market." Id. at 623. The same considerations apply in this case. Although the district court found no conspiracy between the NMU and the large shipping companies to injure the smaller companies, it must still evaluate the agreement between the NMU and the shipping companies for its effect on the market.

LUMBARD, *Circuit Judge* (concurring in part and dissenting in part):

I agree with my brothers that any limitation of recovery under the injunction bond rule does not bar full recovery for violation of the antitrust laws.[1] But I disagree with my brothers' failure to find that there has been a violation of the antitrust laws since the record made in the court below furnishes ample basis for such a determination. In my view, it remains only for the district court to assess the damages and enter judgment.

Connell Construction Co. v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 634 (1975) squarely rejected the argument that § 303 of the LMRA provided the exclusive employer remedy for violations of the "hot cargo" prohibition of § 8(e) of the National Labor Relations Act ("NLRA"), 28 U.S.C. § 158(e). In determining whether to apply labor's nonstatutory exemption, the Court observed that "labor policy requires tolerance for lessening of business competition based on differences in wages and working conditions[,]" 421 U.S. at 622, but an agreement between a union and a nonlabor party which restrains competition in any other manner is not immune, 421 U.S. at 622-23; see *Mine Workers* v. *Pennington,* 381 U.S. 657, 662 (1965); *Allen Bradley Co.* v. *Electrical Workers,* 325 U.S. 797, 806-11 (1945). In applying these standards to the facts before it, the *Connell* Court analyzed

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1 It seems to me there is considerable doubt of the continued validity of the limitation of recovery for wrongful injunction to the amount of the bond. See Metzger & Friedlander, The Preliminary Injunction: Injury Without Remedy? 29 Bus. Law. 913 (1974); Note, Interlocutory Injunctions and the Injunction Bond, 73 Harv. L. Rev. 333 (1959); and Note, Recovery of Damages on Injunction Bonds, 32 Colum. L. Rev. 869 (1932). However, as appropriate recovery should be available for violations of the antitrust laws, no purpose would be served by further examination of that question.

the agreement in issue in terms of § 8(e) of the NLRA. Although the union argued that the agreement was saved by reason of the construction industry proviso to § 8(e), the Court disagreed and found it to be an illegal secondary boycott.

Once the Court reached the § 8(e) issue it deemed it unnecessary to engage in further scrutiny but concluded that the union was not immunized from antitrust liability. 421 U.S. at 634-35. I believe that inasmuch as the National Labor Relations Board ("NLRB"), 196 NLRB No. 165 (1972), and this court, 486 F.2d 907 (2d Cir. 1973), cert. denied, 416 U.S. 970 (1974), have adjudicated the NMU restraint-on-transfer clause and efforts at its enforcement to be a violation of § 8(e), there is no need for us or for the district court to re-examine this record. See *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100,* 483 F.2d 1154, 1179 (5th Cir. 1973), *rev'd,* 421 U.S. 616 (dissenting opinion of Circuit Judge Clark).

Implicit in our prior decision enforcing the Board's order was an acceptance of its finding that the restraint-on-transfer clause prevented Commerce from selling the S.S. Barabara to Vantage, 486 F.2d at 911.[2] We also ruled that the *National Woodwork* standards were met since the clause was not "addressed to the labor relations of the contracting employer *vis-à-vis* his own employees," 486 F.2d 912, *quoting National Woodwork Mfgrs Ass'n* v. *NLRB,* 386 U.S. 612, 645 (1967). These two conclusions are sufficient to meet the *Connell* standard that the clause have "a potential for restraining competition in the business market in ways that would not follow naturally from

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2 The district court's opinion arrives at the same basic finding but for its legal conclusion which we today reject that the NMU's resort to arbitration and the ensuing injunction were nonactionable superseding causes. 411 F. Supp. at 1239.

elimination of competition over wages and working conditions." 416 U.S. at 635.[3]

The majority suggests that inclusion of the clause in "a lawful collective-bargaining agreement" might save it from antitrust scrutiny, —— F.2d at ——, slip op. at ——, *quoting Connell*, supra at 626. But that argument has no application to the facts before us since we have already ruled that portion of the collective-bargaining agreement to be unlawful as violative of § 8(e).

The record before us requires a finding of liability on either a per se or rule-of-reason analysis of the NMU's actions.[4] Under the per se approach a well-meaning purpose will not insulate a group boycott from liability, see *Fashion Originators Guild of America, Inc.* v. *FTC*, 312 U.S. 457 (1941); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), and its anticompetitive effect will be presumed, see *Northern Pacific Railway* v. *United States*,

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3 This view is fully consistent with the thoughts of Professor Handler whose comments are favorably cited by the majority:

> To me the test should be this: Whatever is required or expressly authorized under existing labor legislation should be exempt from the antitrust laws. And whatever is mandatory should be determined in the light of our national labor policy, which should override any countervailing antitrust considerations.

Handler, Labor and Antitrust: A Bit of History, 40 Antitrust L.J. 233, 238 (1971).

Perhaps a finding of no exemption entails a preliminary appraisal of the nature and merits of the underlying antitrust claim, but it does not necessarily follow that the labor organization will be found liable on that claim. "Exemption and liability are not co-extensive concepts." *Id.* at 237. The removal of the shroud of immunity simply means that the union must answer to the charge of violating the antitrust laws.

4 In a post-*Connell* decision, the Eighth Circuit has found the per se approach to be inapplicable to a group boycott arising out of a labor agreement. See *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), cert. filed, 45 U.S.L.W. 3511 (Jan. 25, 1977). A rule of reason inquiry in the context of a labor boycott might well be an appropriate means to balance the goals of the antitrust laws with the positive values of collective-bargaining.

356 U.S. 1, 5 (1958).[5] Under the balancing approach of the rule of reason, examination of the facts of this case indicates that the anticompetitive effects of this particular agreement outweigh any legitimate collective bargaining concerns.

Judge Griesa's 58 page opinion carefully traced the bargaining practices in the shipping industry and found that the restraint-on-transfer clause had its genesis in complaints made by Joseph Curran, president of the NMU, in a January 22, 1968 letter to Edward Silver concerning the loss of NMU-represented vessels through sale and transfer. Silver, who testified at trial, was the lawyer and chief negotiator for the two major shipping owners associations, the Tankers Service Committee ("TSC") and the Maritime Service Committee ("MSC"). The restraint-on-transfer clause was first successfully negotiated into a collective-bargaining agreement by the Maritime Engineers Beneficial Association ("MEBA"), a non-competing union, in a May, 1968 amendment to its contract with MSC. Judge Griesa found this version of the restraint-on-transfer clause to be the model for the NMU clause. The district judge found the purpose of the clause to have been memorialized in the following portion of a June 25, 1969 letter from J. M. Calhoon, president of MEBA to Silver:

> The original and continuing purpose of said Memorandum is: To preserve the jobs and job rights of the Company's engineers covered by our collective bargaining agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such engineers under said Agreement.

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5 For a recent and thorough review of this subject see McCormick, Group Boycotts—Per Se or Not Per Se, That is the Question, 7 Seton Hall L. Rev. 703 (1976).

411 F. Supp. 1224, 1233 (S.D.N.Y. 1976). The clause was subsequently adopted without significant discussion in the NMU's 1969 collective-bargaining agreement.

Allen Bradley Co., supra at 798, forecloses any argument that a labor agreement is not unreasonable simply because its general purpose is "to get and hold jobs for [the union members] at good wages and under high working standards." As we noted in our prior decision, the NMU's interest in job preservation was not directed at the crew members of the S.S. Barbara since it is the union's practice to strip a ship of its crew when it is sold and to have it remanned from the hiring halls. 486 F.2d at 914.

The anticompetitive effect of the restraint-on-transfer clause is also apparent from the record before us. Its most immediate impact was to thwart the sale of the S.S. Barbara to Vantage, cause the cancellation of the lucrative SoCal charter, and virtually force the sale of the vessel for scrap. Beyond that, the clause prohibits shipowners from selling their vessels to United States Flag operators unless the prospective buyer agrees to enter into an NMU collective-bargaining agreement. Owners are effectively prevented from selling to a potential buyer whose employees are presently represented by the NMU's rival, the Seafarer's International Union ("SIU"). Sales are, therefore, limited to foreign flag operators, non-SIU operators, or those who would buy for scrap value. Mergers between small NMU represented owners and small SIU represented owners are foreclosed. By encouraging sales to foreign flag owners, the clause lessens competition among the American owners.

In summary, whether the appropriate inquiry is under a rule of reason or the per se measure, the record requires a finding that the Union must be held responsible for violation of the antitrust law.

I would hold that the NMU has violated § 1 of the Sherman Act, 15 U.S.C. § 1, and remand to the district court solely for determination of damages.

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 Civ. 582

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff,

v.

COMMERCE TANKERS CORPORATION,

Defendant-Counterclaimant,

and

VANTAGE STEAMSHIP CORP.,

Intervening Defendant.

72 Civ. 4619

VANTAGE STEAMSHIP CORP.,

Plaintiff,

v.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Defendant.

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GRIESA, J.

This is the final stage of litigation in these two consolidated cases involving National Maritime Union of America ("NMU"),

Commerce Tankers Corporation, and Vantage Steamship Corp. The remaining matters to be covered relate to the counterclaims of Commerce against NMU in 71 Civ. 582 and the claims of Vantage against NMU in 72 Civ. 4619. These matters have been tried by the court without a jury. This decision constitutes findings of fact and conclusions of law.

Prior Proceedings

This litigation grows out of an attempt by Commerce to sell its ship, the S.S. Barbara, to Vantage pursuant to a contract of sale dated December 23, 1970. The contract price was $2,750,000. At the time of this contract of sale, Commerce had a collective bargaining agreement with NMU covering the unlicensed personnel on Commerce's vessels. Article I, Section 2 of this collective bargaining agreement provided that if the employer sold any of its ships to a buyer who would operate under the United States flag, the ship should be sold with the complement of NMU employees, and that the employer would obtain from the buyer an undertaking that the NMU collective bargaining agreement would apply to the vessel.[1] Article I, Section 2 will sometimes be referred to as the "restraint on transfer clause."

The problem created by the proposed sale of the S.S. Barbara to Vantage was that Vantage's collective bargaining agreement for unlicensed seamen was with NMU's rival organization — Seafarer's International Union ("SIU"). Vantage did not intend to man the S.S. Barbara with NMU members, nor did Vantage give Commerce any undertaking that it would do so.

After learning of the proposed sale, NMU demanded enforcement of the restraint on transfer clause by way of arbitration, which was held before Arbitrator Theodore Kheel in

New York City on February 8, 1971. The arbitrator found in favor of NMU and ordered that Commerce not transfer the S.S. Barbara to Vantage or any other purchaser without complying with the clause.

On February 9, 1971 the first of the actions in this court, 71 Civ. 582, was commenced by NMU against Commerce to obtain enforcement of Arbitrator Kheel's decision.

Vantage was thereafter permitted to intervene in this action. On March 2, 1971 Judge Frankel handed down a decision holding that a preliminary injunction should issue restraining the transfer of the S.S. Barbara in violation of the restraint on transfer clause. *National Maritime Union v. Commerce Tankers Corp.*, 325 F. Supp. 360 (S.D.N.Y. 1971). The preliminary injunction was signed March 4, 1971. NMU was required to post a bond of $10,000. Commerce and Vantage appealed.

On May 24, 1971 the New York Regional Director of the National Labor Relations Board issued a complaint against NMU charging that the restraint on transfer clause in the Commerce-NMU collective bargaining agreement violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. §158(e). On the same day the NLRB filed a petition in this court (71 Civ. 2300) asking for a preliminary injunction under Section 10(1) of the National Labor Relations Act, 29 U.S.C. §160(1). The NLRB filed an amended petition on June 1 adding Commerce as a respondent.

On May 27, Commerce filed a motion in the District Court to vacate Judge Frankel's preliminary injunction in view of the NLRB charges.

Both the NLRB's §10(1) motion in 71 Civ. 2300 and Commerce's motion to vacate in 71 Civ. 582 were heard by

Judge Croake on June 4, 1971. On July 15 Judge Croake issued a decision denying both motions. *McLeod v. National Maritime Union,* 329 F. Supp. 151 (S.D.N.Y. 1971). Appeals were taken.

On March 22, 1972 the Second Circuit Court of Appeals reversed the rulings of Judges Frankel and Croake, holding that there was reasonable cause to believe that Article I, Section 2 of the NMU-Commerce collective bargaining agreement involved an unfair labor practice and that therefore a Section 10(1) injunction should issue. The Court of Appeals also held that, because of the filing of the NLBR complaint subsequent to Judge Frankel's preliminary injunction, that injunction should be vacated. *National Maritime Union v. Commerce Tankers Corp.,* 457 F. 2d 1127 (2d Cir. 1972).

Unfortunately, by this time the proposal to transfer the S.S. Barbara to Vantage was dead, for reasons to be described hereafter. On May 1, 1972 Commerce sold the Barbara to Plaza Shipping, Inc. (an NMU contract company) for a greatly reduced price — $700,000.

Meanwhile, the unfair labor practice matter had been proceeding in the NLRB. On September 2, 1971 NLRB Trial Examiner Thomas F. Ricci filed a decision recommending dismissal of the complaint. On May 16, 1972 the Board issued its decision, reversing the trial examiner, and holding that Article I, Section 2 of the NMU-Commerce agreement was invalid because it violated Section 8(e) of the National Labor Relations Act. Upon the NLRB's petition for enforcement, in which Vantage intervened in support of the NLRB, the Court of Appeals (opinion of Judge Feinberg joined by Judges Lumbard and Friendly) upheld the NLRB's ruling. *NLRB v. National Maritime Union,* 486 F.2d 907 (2d Cir. 1973), *cert. denied,* 416 U.S. 970 (1974).

It is appropriate here to discuss this decision in some detail. Section 8(c) provides:

> "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: . . ."

The Court noted that Section 8(e) does not "shimmer with clarity" and that the question presented was "difficult to decide." *Id.* at 910, 911. The Court further noted that the primary purpose of Section 8(e) was to curb certain "secondary" labor activities. NMU argued that Article I, Section 2 was proper because it had the "primary" labor objective of preserving work for its members vis-a-vis Commerce and other NMU employers. However, the Court of Appeals held that the contractual clause went beyond "work preservation," and had an illegal secondary purpose of expanding NMU jurisdiction to non-NMU employers such as Vantage.

Concurrently with these proceedings in the federal courts and the NLRB, there was an arbitration and a state court proceeding involving Commerce and Vantage.

On February 10, 1971 Commerce demanded arbitration against Vantage on the December 23, 1970 contract of sale, claiming damages for breach of contract. On March 29, 1971, in

an action in Supreme Court, New York County, Justice Streit ordered arbitration. The arbitration commenced May 12. On July 9, the arbitrators awarded Commerce damages measured by the amount of the contract price for the S.S. Barbara — $2,750,000, plus other damages in the amount of $133,264, less the net proceeds to be realized upon the resale of the S.S. Barbara.

As already described, Commerce sold the Barbara to Plaza Shipping, Inc. on May 1, 1972 for $700,000.

On November 20, 1972 Justice Abraham J. Gellinoff issued a decision confirming the arbitration award. This was affirmed by the Appellate Division, First Department, on April 5, 1973. *Vantage Steamship Corp. v. Commerce Tankers Corporation,* 41 A.D.2d 813, 342 N.Y.S.2d 281 (1st Dept. 1973).

On October 30, 1972 Vantage commenced an action in this court (72 Civ. 4619) against NMU and Commerce. Among other things, Vantage alleged that NMU and Commerce had been guilty of an unfair labor practice and had violated Section 1 of the Sherman Act. This is one of the cases being dealt with in the present opinion.

On May 31, 1973 Vantage and Commerce concluded a settlement of all disputes between these parties. Vantage agreed to pay Commerce $700,000 in installments over a period of time. Commerce and Vantage exchanged releases in which there were express reservations of rights against NMU.

The net result of all these proceedings is that there remain for determination Commerce's claim against NMU for damages in 71 Civ. 582 and Vantage's claim against NMU for damages in 72 Civ. 4619.

Contentions of Commerce and Vantage

Commerce and Vantage claim that NMU is liable for damages under Section 303 of the Labor Management Relations Act, 29 U.S.C. §187, which provides:

> "§187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages
>
> "(a) It shall be unlawful, for the purpose of this section only in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."[2]

Section 303 authorizes a suit for damages where there has been a violation of Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. §158(b)(4). The relevant passages in Section 8(b)(4) are as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agent —

* * *

"(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . ."

The references to "subsection (e) of this section" is the Section 8(e) which was found to have been violated by the Court of Appeals in its opinion in the NLRB proceeding. 486 F.2d 907. As already described, that court held that Article I, Section 2 of the NMU-Commerce agreement was a violation of Section 8(e). However, the *mere making* of a contract which violates Section 8(e) does not in and of itself give rise to a cause of action *for damages.*

It is only where the *added* elements of Section 8(b)(4) are found to exist that a cause of action for damages accrues. For instance, the latter section would be violated where a labor union *threatens, coerces* or *restrains* an employer with the object

of *forcing* or *requiring* the employer to enter into the Section 8(e) agreement. Similarly, Section 8(b)(4) would be violated if a labor union threatens, coerces or restrains an employer in order to force or require him to cease doing business with another party.

Commerce and Vantage claim that NMU violated Section 8(b)(4) in that (1) NMU coerced Commerce into entering into the collective bargaining agreement containing the Article I, Section 2 provision which violated Section 8(e); (2) that NMU coerced Commerce, and forced Commerce to cease doing business with Vantage, and forced a prospective charterer to cease doing business with Vantage — such coercion and force being the strike threat contained in Article I, Section 2; (3) NMU restrained Commerce, and forced Commerce to cease doing business with Vantage, by obtaining the preliminary injunction from Judge Frankel.

Commerce and Vantage further contend that NMU is liable under Section 1 of the Sherman Act. In the first place, Commerce and Vantage urge that there is no labor law exemption from antitrust liability here citing *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975). Vantage and Commerce then contend that NMU has Sherman Act Section 1 liability on the following related but somewhat different theories: (1) That the restraint on transfer clause involved a group boycott against certain potential purchasers of vessels and therefore constituted a *per se* violation; and (2) that the sale and transfer clause was the result of a combination or conspiracy between NMU and large shipping companies to enhance their competitive and financial position at the expense of smaller companies such as Commerce.

Commerce and Vantage also rely upon certain common law theories. They contend that NMU wrongfully induced the

breach of the contract between Commerce and Vantage for the sale of the S.S. Barbara. Commerce and Vantage also contend that NMU is liable for obtaining a "wrongful injunction" — *i.e.*, the preliminary injunction issued by Judge Frankel.

Vantage claims that Article I, Section 2 violated New York General Business Law §340, known as the Donnelly Anti-Trust Act.

The amounts of damages (before any trebling based upon the Sherman Act theory) are claimed to be as follows. Commerce claims that it is entitled to a total of $1,550,000, calculated by taking the contract price for the S.S. Barbara ($2,750,000) and subtracting the amount realized upon the resale to another purchaser ($700,000) and further subtracting the amount received from Vantage in the settlement ($700,000), giving a net total of $1,350,000, to which is added to costs of holding the S.S. Barbara after it was supposed to have been delivered to Vantage ($200,000). Vantage claims a total of $2,230,000, consisting of loss of profits on a charter it had for the S.S. Barbara with Standard Oil of California — the alleged profits being $1,500,000; amounts invested by Vantage in repair of the S.S. Barbara ($30,000); and the amount paid to Commerce in the settlement ($700,000).

Contentions of NMU

NMU denies the validity of each of the above theories. In addition NMU asserts certain affirmative contentions. NMU urges that the only action it took to enforce Article I, Section 2 was to obtain an arbitration award, and then sue in this court to enforce that award. NMU contends that it was the preliminary injunction of Judge Frankel in this lawsuit which prevented the consummation of the sale of the S.S. Barbara to Vantage and the fulfillment of the charter which Vantage had obtained for the

vessel. NMU argues that Commerce and Vantage did not pursue available remedies in the Court of Appeals in a timely or appropriate manner. NMU contends that its liability, if any, is limited to the amount of the $10,000 bond posted for the preliminary injunction.

NMU also urges that the settlement of the mutual claims of Commerce and Vantage operates as a bar to any recovery by either of these parties against NMU.

Further Facts

Background of Article I, Section 2

A substantial part of the evidence in this case relates to the contention of Commerce and Vantage that the restraint on transfer clause (Article I, Section 2) of the NMU-Commerce collective bargaining agreement was the result of a joint effort by larger shipping companies to somehow prejudice the smaller companies and reduce competition.

Commerce and Vantage contend that the large companies were attempting to inhibit free transfer of vessels so as to keep the contributor to the union pension funds "bound into the contributing group" (Commerce Post-Trial Brief p. 28). Moreover, Commerce and Vantage contend that the large companies were attempting to reduce competition in certain trade carried on by United States flag vessels.[3] Commerce and Vantage allege that, since Article I, Section 2 imposed its restrictions only upon sales to a United States flag operator, the result would be to encourage sales to foreign flag operators thus reducing the number of United States flag vessels.

There is no direct evidence that these alleged purposes were discussed or agreed upon by the larger companies. Commerce

and Vantage assert that their claims of combination or conspiracy on the part of the larger shipping companies are proved by circumstantial evidence about the background of the collective bargaining agreement in question, and about the methods used in negotiating this agreement.

In the United States maritime industry there are separate unions representing the unlicensed seamen, the engineers, the deck officers and the radiomen.

There are competing unions for the different categories of personnel — an example being the NMU and SIU rivalry respecting unlicensed seamen. In one segment of the United States shipping industry the companies have contracts with a particular line-up of unions, as follows:

Category	Union
Unlicensed seaman	NMU
Engineers	Marine Engineers Beneficial Association ("MEBA")
Deck officers	Masters, Mates and Pilots ("MMP")
Radiomen	American Radio Association ("ARA")

Among the shipping companies having contracts with this group of unions — NMU, MEBA, MMP and ARA — are companies who have formed certain committees to act together in bargaining with the unions. One such committee is the Tanker Service Committee ("TSC"), which represents certain large tanker operators. The other committee is the Maritime Service Committee ("MSC"), which represents certain non-tanker operators. For many years a lawyer by the name of Edward

Silver has represented both the TSC and the MSC in negotiations with these unions.

Many companies other than members of the TSC and the MSC have collective bargaining agreements with this set of unions. These other companies have been referred to in this action as the "independents." Commerce was such an "independent" tanker company, operating two tankers. Although the independents are not represented by the TSC and MSC in any legal sense, the independents have in practice generally acquiesced in the agreements worked out by the committees.

In 1961 or thereabouts NMU, MEBA, MMP and ARA entered into labor contracts which were due to expire in June 1965. In 1963 NMU agreed with its contract employers that its agreement would be extended until June 1969, subject to possible "wage reopeners" in 1967 or 1968. NMU hoped that the other unions would follow, thus creating some degree of stability in maritime labor relations. However, this did not occur. When the non-NMU contracts expired in 1965, there was a strike by MEBA which shut down a large segment of the shipping industry. One of the problems was the contention that MEBA was not receiving benefits granted to MMP.

When the 1965 agreements with MEBA, MMP and ARA were arrived at, one of the features of these agreements was what are known as "most favored nation" clauses. These clauses provided basically that each union would receive the equivalent of the most favorable treatment given to another union. The 1965 agreements were to last until June 1969.

The NMU contract, having been entered into prior to 1965, did not have a most favored nation clause.

The most favored nation clauses proved to be highly unsatisfactory. An arbitration award in favor of one union would lead to an arbitration proceeding by another union claiming to be entitled to the benefits conferred upon the union in the first proceeding.

Moreover, during the 1965-1969 period serious questions arose regarding the funding of union pension plans. One problem related to what is called the "past service liability."

When the union pension funds were established (the NMU fund was established in 1951), the companies became liable for contributions, not only for benefits based upon current services of the employees, but also for benefits based upon past services — *i.e.*, services performed by employees prior to the adoption of the pension plan. By the late 1960's the companies as a whole were delinquent on their past service liabilities to the extent of many millions of dollars.

Subsequent to the conclusion of the 1965 labor contracts, the ARA obtained an arbitration award directing that the past service liability of the companies to the ARA pension plan should be made up in a short period of time — about five to seven years. This was a cause of severe consternation to the shipping companies. If the formula decided upon by the arbitrator with respect to the ARA were to be applied with respect to other union pension funds, the burden on the companies would be acute.

Lee Pressman, attorney for the MEBA, proposed a compromise. Under his proposal the funding of past service liabilities would be stretched out to either 15 or 25 years depending on the relative age of the vessels owned by a particular company. A company having vessels with an average age of more than 20 years would fund its past service liability

over a period of 15 years. A company having vessels with an average age of less than 20 years would fund the past service liability over a period of 25 years. It appears that in 1967 this proposal was agreed upon by the TSC and MSC and also by the group of unions — NMU, MEBA, MMP and ARA. The evidence is not precise as to whether the independent shipping companies agreed. The implication is that they acquiesced in their normal manner.

Obviously the companies able to stretch their past service funding over 25 years would have a somewhat lighter financial load than the companies required to do the funding in 15 years. Commerce and Vantage contend that this was one of the instances in which the larger shipping companies combined to place the smaller companies at an economic disadvantage. The idea is that the larger companies had the newer fleets and dealt themselves the more favorable funding treatment.

The weight of the evidence does not support this contention. For instance, United Fruit had a large fleet, but the age of the fleet was such as to put United Fruit in the shorter — 15 year — funding category. Commerce itself appears to have been eligible to receive the benefit of the 25-year funding.

During this period, NMU and MEBA manifested concern about loss of jobs for their members due to discontinued operation of vessels or sale of vessels to companies not having contracts with these particular unions.

On January 22, 1968 Joseph Curran, president of NMU, wrote Silver complaining:

> "The shipowners have been engaged in the sale and transfer of vessels and the merger of

> companies at such a rapid rate that new transfer agreements go into effect before the ink on the old ones is dry."

The letter stated that this situation prevented "stability" in the industry and further stated that the union would take

> ". . . appropriate action to protect its contracts, the security of its pension programs, and the rights of our members and their families to receive the pension benefits which they have earned."

NMU took no immediate action. However, MEBA entered into discussions on the subject with Silver. The result was that in May 1968 MSC and MEBA agreed upon an amendment to their collective bargaining agreements in the form of a restraint on transfer clause of the kind which later became the Article I, Section 2 involved in this action. In other words the genesis of NMU's restraint on transfer clause was the MEBA-MSC contract amendment of May 1968.

In late 1968 and early 1969 the unions and the TSC and MSC were preparing for the collective bargaining negotiations which would take place in connection with the expiration of the NMU, MEBA, MMP and ARA contracts in June 1969.

The subject of funding the union pension plan was under further consideration. Funding of union pension plans was based upon contributions from the companies. An individual company would contribute on the basis of the number of man-days of employment with that company. If a company scrapped or sold vessels, or if it acquired more modern vessels requiring less crew, this company's man-days of employment would be reduced. The practice in the industry was to have periodic

calculations by actuaries as to the amounts of money required to fund the union pension plans and the number of man-days being worked, and an assessment of the amount of money per man-day required to be contributed.

The unions were concerned about the solvency of their pension plans because of loss of employment — reduction in man-days — in the United States maritime industry. The problem related to the entire subject of funding, both past service and present service liabilities. The concern existed despite the fact that in theory, even if man-days were reduced, solvency of the funds could be insured by actuarial adjustments increasing the contribution per man-day.

During 1968 and early 1969 NMU, MEBA, MMP and ARA reached an agreement among themselves that they would present, as far as possible, common demands to the shipping companies in the forthcoming 1969 collective bargain negotiations. This was designed to avoid disputes which had been created by different unions obtaining different benefits. The common bargaining approach was also designed to do away with the most favored nation clauses, which were now condemned by both the companies and the unions.

One of the demands which the unions agreed to make upon the companies was for guaranteed minimum contributions to the union pension funds. It was also agreed that each of the unions would request the restraint on transfer clause which had been obtained by the MEBA from the MSC in May 1968.

The collective bargaining negotiations opened on April 2, 1969. It had been arranged that these negotiations would be held on a coordinated basis involving all of the unions — NMU, MEBA, MMP and ARA. At the opening session on April 2 representatives of all the unions met together with company

representatives. Thereafter, at least for a time, company representatives met with a different union each day on a rotating basis.

Invitations to the negotiations commencing April 2 were given not only to the TSC and MSC companies but also to the independents, including Commerce. However, there was little or no participation by the independents. Commerce attended none of the sessions. The effect was that the negotiations on behalf of all the companies were carried on by the representatives of the TSC and MSC.

The first phase of the negotiations concerned what are called "economic terms" — referring in general to wages, overtime rates, pension fund contributions and similar items. The second phase of the negotitions related to work rules and other items not covered by the economic terms.

By July 1969 the economic terms had been worked out. These terms were incorporated in memoranda of understanding relating to the different unions. Such a memorandum, relating to NMU and the tanker companies, was signed by NMU and the TSC on July 16, 1969. This memorandum was sent to Commerce for signature. Commerce signed and returned it to NMU on July 13, 1969.

Among other things, the NMU-tanker company economic terms provided that the tanker companies would guarantee pension fund payments to NMU under a formula which would provide a minimum of $44 million per year. It appears that this formula was intended to include both past service and present service obligations.[4]

With regard to the restraint on transfer clause, it was apparently assumed by all parties to the negotiations that the

clause, which had been adopted by MEBA and the TSC in May 1968, would be incorporated in all the collective bargaining agreements being negotiated in 1969. There is no evidence of any debate or dispute on the subject. J. M. Calhoon, president of MEBA, wrote a letter to Silver dated June 25, 1969 "confirming" the purpose of the May 1968 memorandum of understanding as to the restraint on transfer clause as follows:

> "The original and continuing purpose of said Memorandum is: To preserve the jobs and job rights of the Company's engineers covered by our collective bargaining agreement and to protect and maintain the wages, pension rights and other economic benefits and working conditions provided such engineers under said Agreement."

The restraint on transfer clause was not included in the July 16, 1969 memorandum of understanding regarding the NMU-tanker company economic terms. It appears that this clause was formally agreed upon at some point during the balance of the contract negotiations, which lasted until sometime in December 1969.

Subsequent to July 1969, Commerce was sent three other memoranda of understanding relating to various provisions — on August 5, August 18 and September 30. None of these dealt with the restraint on transfer clause.

However, the restraint on transfer clause (Article I, Section 2) was included in the final agreement — the so-called "Bluebook," entitled "June 16, 1969-June 15, 1972 Agreement Between Various Tanker Companies and The National Maritime Union of America, AFL-CIO." Due to an oversight by NMU personnel, the companies were not actually requested to sign the final agreement or any memorandum indicating their assent to

it. However, the agreement was put into effect. Commerce made no objection to the restraint on transfer clause or to any other provision. Commerce does not deny that it was in fact a party to the final agreement, although Commerce never signed it.

It appears that the restraint on transfer clause was included in the other union contracts — *i.e.,* MEBA, MMP and ARA — negotiated in 1969 with both the tanker and non-tanker companies.

I reject the contention of Commerce and Vantage that the TSC and MSC, as far as any issue in this case is concerned, negotiated improperly for the benefit of the larger companies vis-a-vis the smaller companies such as Commerce. The restraint and transfer clause was a demand by the unions on all the companies, large and small. There is no evidence whatever to suggest that the larger companies promoted the restraint on transfer clause in any way, or regarded it as a device to benefit them at the expense of the smaller companies. As to the matter of maintaining the pool of contributors to the union pension funds, it is clear that this was one of the reasons why the *unions* demanded the restraint on transfer clause from *all* the companies. However, there is no evidence that the larger companies sought the restraint on transfer clause in order to lock smaller companies into the group of pension fund contributors. There is also no support in the evidence for the contention that the restraint clause was intended to encourage sales to foreign companies, thus reducing competition in United States flag trade.

Sale of the S.S. Barbara

As of late 1970 Commerce was owned by Vernitron Corporation of Great Neck, New York. The president of Commerce was Milton Pilalas. Herman S. Nathanson became president of Vernitron in November 1970.

Vernitron decided to discontinue its shipping business and to sell Commerce's two vessels — S.S. Thalia and S.S. Barbara. Nathanson took charge of the arrangements for the sale of the vessels. Because of disagreements between Pilalas and Vernitron, Pilalas had little participation in the dealings relating to the sales of the Thalia and the Barbara.

Nathanson was assisted by David Cohen, house counsel and assistant secretary of Vernitron. Vernitron also retained admiralty counsel — Kenneth Simon.

Final negotiations for the sale of the vessels took place in late December 1970. The prospective purchaser of the Thalia at this time was Tanker "Four Lakes," Inc. For the Barbara, it was Vantage Steamship Corp. The president of Vantage was Philip Corletta.

Simon was familiar with the restraint on transfer clause in the union agreements. The contract for the sale of the Thalia to Tanker "Four Lakes" contained a paragraph complying with that clause — *i.e.*, requiring the continuation of the same unions. This clause apparently presented no problem to Tanker "Four Lakes."

Simon prepared a draft contract for the sale of the Barbara to Vantage. This draft contained a paragraph about continuation of unions.

On December 22, 1970 the representatives of Vernitron — Nathanson, Cohen and Simon — met with Corletta of Vantage. In the midst of discussing various matters, there was a brief mention of the union continuation clause. Corletta said that the clause must be eliminated because Vantage was an SIU company. Nathanson or Simon asked about a possible union problem for Commerce. Corletta replied that after the vessel was delivered this would be Corletta's problem.

The contract for the sale of the S.S. Barbara by Commerce to Vantage was signed December 23, 1970. It did not contain a union continuation clause. The vessel was to be delivered on or before February 28, 1971, although the time could be extended for certain specified reasons, or for any reason beyond Commerce's control, to April 4, 1971. The contract would be extended even after that date if Vantage did not give notice of cancellation.

Events Subsequent to Sale

A public announcement of the sales of the Thalia and the Barbara by Commerce was made on December 28, 1970. Word of the sales was picked up by NMU shortly thereafter. There apparently was no problem from NMU's standpoint regarding the Thalia. However, NMU was concerned about the Barbara being transferred to an operator under contract with SIU. On January 7, 1971 Mel Barisic of NMU called Pilalas of Commerce to inquire about the sale. On January 11 Barisic sent a letter to Commerce asking what steps would be taken to comply with Article I, Section 2 of the Commerce-NMU contract. On January 13, Pilalas responded by letter stating that he had no reason to believe that the same unions would not be continued on the Barbara following the sale.

At about this time, an NMU lawyer spoke to Corletta of Vantage on the telephone, requesting an undertaking from Vantage that Article I, Section 2 would be complied with. Corletta refused to give such assurance.

On January 25, 1971 NMU made a demand for arbitration of its rights under Article I, Section 2 respecting the sale of the Barbara. This resulted in the arbitration held February 8 before Arbitrator Kheel and his decision in favor of NMU, all as described earlier in this opinion.

In the earlier portion of this opinion entitled "Prior Proceedings" I have described the main features of the complex litigation which occurred during 1971-1973. Certain other details must be added. These relate particularly to questions about (1) the frustration of the sale of the Barbara to Vantage and of a charter which Vantage had obtained for the Barbara; (2) the fixing of the injunction bond by Judge Frankel; and (3) the timeliness of the appellate remedies sought by Commerce and Vantage.

On the same day the arbitration occurred — February 8, 1971 — Vantage entered into an agreement with Standard Oil of California ("SoCal") to charter the Barbara to SoCal for one year commencing some time between February 15 and March 5, 1971.

As stated earlier, NMU sued in this court on February 9, 1971 to obtain enforcement of Arbitrator Kheel's award of February 8.

At the time the complaint was filed, NMU presented an order to show cause for a hearing on a preliminary injunction motion to restrain the sale of the Barbara in violation of Article I, Section 2. Judge Wyatt signed the order to show cause setting the hearing on the preliminary injunction motion for February 16. The order to show cause also contained a temporary restraining order. Judge Wyatt fixed the amount of the bond for the TRO as $10,000.

On February 10 NMU and Commerce agreed to adjourn the hearing to February 23 and agreed that the TRO would remain in effect.

On February 11 NMU posted the required $10,000 bond. Under the terms of the bond the surety undertook

> ". . . that the Plaintiff [NMU] will pay to the Defendant [Commerce Tankers Corporation] so enjoined, such damages no exceeding the sum of Ten Thousand and No/100 ($10,000) as it may sustain by reason of the injunction, if the Court shall finally decide that the Plaintiff was not entitled thereto; such damages to be ascertained by a reference, or otherwise as the Court shall direct."

On February 18 Commerce filed papers supporting Vantage's motion to intervene which had been filed February 16. Commerce also opposed NMU's motion for a preliminary injunction and requested that the TRO be vacated, or in the alternative asked that NMU be required to post a bond in the amount of $2,750,000 to cover Commerce's potential loss of the ship sale and an additional bond to cover Vantage's potential loss of the SoCal charter.

Following a hearing on February 18, Judge Wyatt handed down a memorandum on February 19 granting Vantage's motion to intervene and holding that the temporary restraining order should be dissolved on condition that a bond be posted to cover contributions to the NMU pension fund. On February 22 Judge Wyatt signed an order based on that memorandum and fixing the amount of the bond as $278,361.

Commerce and Vantage agreed that each would provide half of this bond. Commerce arranged for its half. Vantage failed to provide its half.

The preliminary injunction motion was heard on February 23 by Judge Frankel. On that day he orally restored the TRO. On February 24 Judge Frankel signed an order continuing the TRO on the basis of a $10,000 bond posted by NMU. On

February 25 Judge Frankel signed a revised TRO, again fixing the bond at $10,000.

Judge Frankel's decision of March 2, holding that a preliminary injunction should issue prohibiting the sale of the Barbara in violation of Article I, Section 2, further held that the $10,000 amount of the TRO bond would be sufficient for the preliminary injunction. Judge Frankel stated that in his view the protestations of Commerce and Vantage regarding threatened financial loss were not impressive. Judge Frankel noted that Commerce and Vantage had simply ignored the Article I, Section 2 provision, and had made their contract without seeking a timely test before a court or arbitrator.

Judge Frankel's preliminary injunction of March 4 contained the provision:

> "ORDERED, that Plaintiff shall post a bond in the amount of Ten Thousand ($10,000.00) Dollars for the payment of such costs and damages as defendant may be found to have incurred should it hereafter be determined that this injunction was wrongfully issued."

Apparently none of the parties, in submitting proposed orders to Judge Frankel, considered the possible need to delineate the rights of Commerce and Vantage with respect to the bond or bonds. In any event, the caption of the order refers to Commerce as "Defendant" and Vantage as "Intervening Defendant." The paragraph in the order dealing with the bond refers only to a singular "defendant," which, literally read, would mean Commerce. In any event, no other bond was ever filed than the $10,000 bond filed in the TRO. The sole beneficiary of this bond is Commerce.

March 5, 1971 was the original deadline for delivery of the Barbara by Vantage to SoCal on the charter. This deadline was orally extended. During the subsequent period of time there were intensive discussions regarding possible mechanisms for carrying out the SoCal charter for the Barbara. Vantage finally agreed that Commerce could charter the Barbara to SoCal, with Vantage reserving its right to sue Commerce for non-delivery of the vessel, and for profits derived from the charter. However, SoCal refused to accept this proposal and on March 11 notified Vantage that it considered the charter canceled. SoCal's cancellation was the result of complications regarding the injunction and union problems. The evidence shows that at least through the end of March SoCal would have chartered the Barbara if these problems had been resolved.

On March 12, 1971 Commerce requested Vantage to free Commerce to sell the Barbara to another buyer. This request was without prejudice to any alleged damage claims of Vantage. It is clear that, following the cancellation of the SoCal charter, Vantage did not in fact wish to proceed with the purchase of the Barbara, at least at the contract price of $2,750,000. However, until May 26, 1971, Vantage continued to formally insist upon the delivery of the Barbara in order to preserve Vantage's legal rights.

On March 18 Commerce obtained an order to show cause, returnable March 23, for a resettlement of Judge Frankel's order of March 4. The proposed revision was a paragraph stating that Commerce was free to sell the Barbara to a purchaser other than Vantage, who could comply with Article I, Section 2. On March 24 Judge Frankel denied this application.

As described earlier, Commerce at this time was involved in arbitration proceedings against Vantage under the aegis of the

state court. Also, commencing in late May there was an NLRB proceeding, resulting in an action in the federal court to obtain a preliminary injunction against NMU under 29 U.S.C. §160(1), which was denied by Judge Croake on June 4, 1971.

However, Commerce and Vantage had a right of immediate appeal from Judge Frankel's injunction of March 4. The chronology which is now set forth shows that Commerce and Vantage chose not to prosecute this appeal on any urgent basis.

No notices of appeal were filed until Vantage did so on April 1 and Commerce on April 2. Commerce filed the record on appeal with the Second Circuit on May 12 and obtained an extension for filing its brief until June 20. On June 17 Commerce obtained another extension to July 20. On July 19 Commerce obtained a third estension (sic) to August 20, 1971.

On July 20 Commerce filed a motion in the Court of Appeals requesting that the preliminary injunction of Judge Frankel be suspended, modified or dissolved, or, in the alternative, that the bond required to be posted by NMU be increased to $2,750,000. On August 17 Commerce applied for an extension of another 60 days to file its brief. This proposed extension would have lasted until October 19, 1971.

On August 18 the Court of Appeals (Judges Feinberg, Mulligan and Timbers) denied the motion to vacate or amend the injunction and denied the request to increase the bond to $2,750,000. The court ordered that the appeal be expedited and that all briefs should be filed on or before September 29, 1971 with a hearing the week of October 4, 1971. This schedule was complied with.

As already described, the Court of Appeals considered together Judge Frankel's granting of the preliminary injunction

in favor of NMU and Judge Croake's denial of a preliminary injunction against NMU in the NLRB action. The Court of Appeals reversed both rulings on March 22, 1972, by which time the proposed sale of the Barbara to Vantage and the charter of the Barbara to SoCal were no longer feasible.

Neither Commerce nor Vantage made any attempt to obtain immediate or accelerated action by the Court of Appeals — either by motion for a stay, motion for an increased bond or swift prosecution of their appeal. Commerce's motion to suspend Judge Frankel's injunction or to increase the amount of the bond was not filed until 4-1/2 months after the entry of the injunction. Due to Commerce's repeated requests for extensions of time for filing its brief, the appeal was not heard until seven months after the date of the injunction, and the hearing would have been delayed further had it not been for the deadline imposed by the Court of Appeals.

There is every reason to believe that, had Commerce and Vantage proceeded immediately in the Court of Appeals, they could have obtained expedited review. The viability of the transactions involving the sale and charter of the Barbara was clearly threatened by any appreciable delay. It is difficult to believe that the Court of Appeals would have ignored this. Exactly what response the court would have made to a request for immediate appellate action cannot, of course, be known. But Commerce and Vantage never attempted to obtain such relief.

It should be noted that in August 1971 Commerce had discussions through a broker regarding a possible sale of the Barbara to a company called Northeast Petroleum Company, for foreign flag operation. Northeast at first offered $1.3 million and then reduced its offer to $1 million. Northeast asked Commerce to obtain a letter from NMU stating that NMU would not strike Northeast's United States facilities if Northeast

bought the ship for foreign flag operation. Counsel for NMU supplied a letter which made no express concessions, but stated "the collective bargaining agreement is self-explanatory." The sale to Northeast Petroleum did not go through. To the extend that Commerce claims that NMU is responsible, I reject this argument. Certainly there is nothing in Article I, Section 2 which in any way prevented the sale of the Barbara to Northeast Petroleum.

Conclusions of Law

The Labor Statutes

At an earlier point in this opinion I summarized the arguments of Commerce and Vantage in support of their claims for damages under Section 303 of the Labor Management Relations Act, 29 U.S.C. §187, and Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. §158(b)(4). I reject each of these arguments and hold that neither Commerce nor Vantage has a valid claim under these provisions.

The argument that NMU coerced Commerce into entering into the collective bargaining agreement containing the restraint on transfer clause is contrary to the facts. Commerce was content to have the TSC representatives, who had the maximum bargaining power, negotiate on its behalf. Commerce declined the invitation to participate in the negotiations, and took no exception to the terms agreed to by its *de facto* representatives. The practical necessities of this type of bargaining do not constitute the type of coercion requisite for a violation of Section 8(b)(4).

I also reject the argument that the strike threat contained in Article I, Section 2 exerted coercion and force on Commerce and Vantage, causing the frustration of the sale of the Barbara

to Vantage and the charter of the Barbara to SoCal. These arguments have no factual support. The strike provision in Article I, Section 2 did not prevent Commerce from making the agreement for the sale of the Barbara to Vantage. When it came to enforcing Article I, Section 2, NMU did not strike or threaten to strike. NMU went to arbitration and then to court. As to the SoCal charter, this was frustrated as a result of the preliminary injunction and the impatience of SoCal with the legal complications with NMU. SoCal did not cancel because of any coercion from a strike threat.

The final argument under Section 8(b)(4) advanced by Commerce and Vantage is that NMU restrained Commerce and forced Commerce to cease doing business with Vantage, by obtaining the preliminary injunction from Judge Frankel.

The Fifth Circuit Court of Appeals have analyzed the statute and legislative history, and has held that resort to a court for a judicial remedy is not coercion within the meaning of Section 8(b)(4). *Local Union No. 48 v. Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964). The court stated (p. 686):

> "We believe that the Congress used 'coerce' in the section under consideration as a word of art, and that it means no more than non-judicial acts of a compelling or restraining nature, applied by way of concerted self help consisting of a strike, picketing or other economic retaliation or pressure in a background of a labor dispute. Our view is supported by the legislative history."

On the basis of this well-reasoned authority, I reject the contention that NMU violated Section 8(b)(4) by seeking and obtaining a preliminary injunction.

Sherman Act

I have already found against the factual contentions of Commerce and Vantage regarding an alleged combination or conspiracy by the larger shipping companies to enhance their financial and competitive position. However, this leaves open the question as to whether the restraint on transfer clause in the collective bargaining agreement amounted to a *per se* violation of Sherman Act §1. This, in turn, raises another question as to whether the restraint on transfer clause is exempt from the federal antitrust laws.

Both of these issues involve difficult and complex questions of law. The exemption problem depends upon the application of the recent Supreme Court decision in *Connell Construction Co. v. Plumbers and Steamfitters Union No. 100,* 421 U.S. 616 (1975), and earlier decisions, particularly *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), and *Meat Cutters Local 189 v. Jewel Tea Co.,* 381 U.S. 676 (1965). The *per se* violation question also presents numerous problems.

It is inappropriate and unnecessary for me to decide these questions. Even if Article I, Section 2 were held to violate Sherman Act §1, under the facts of this case I would necessarily hold that such violation was not the proximate cause of the injuries sustained by Commerce and Vantage.

NMU took no action to implement or enforce Article I, Section 2 other than to seek a determination of its legal rights by arbitration and by resort to this court. Prior to NMU's commencement of litigation, Article I, Section 2 had not deterred Commerce or Vantage in any way. The provision had simply been ignored.

The proximate cause of the delay and final frustration of

the S.S. Barbara transactions was the preliminary injunction issued by Judge Frankel in a case admittedly involving close and difficult questions of law. The problem created by the injunction was compounded by the long delay of Commerce and Vantage in seeking an appellate remedy.

There can be no recovery in this case on any theory of antitrust violation. Commerce and Vantage can recover only to the extent permitted by the specific rules relating to injuries suffered as a result of the granting of an injunction.

Remedy Regarding Injunction

Rule 65(c) of the Federal Rules of Civil Procedure provides:

> "(c) *Security.* No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

There has been some divergence of view as to the rights, if any, of a party to recover damages for injury resulting from a preliminary injunction later determined to have been erroneously issued. The resolution of the problem by the majority of the courts, both before and after the adoption of Rule 65(c) is as follows. In the absence of malicious prosecution, the seeking of injunctive relief is not a tort. However, a party obtaining a preliminary injunction may be required, as a condition of obtaining the injunction, to provide a bond or other undertaking to indemnify the defendant for injuries resulting

from the injunction, if the injunction is later overturned. In such a case recovery by the injured party is limited to the amount of the bond or undertaking. *Associated General Contractors v. Illinois Conference of Teamsters,* 486 F.2d 972, 975 n.6 (7th Cir. 1973); *United Motors Service, Inc. v. Tropic-Aire, Inc.,* 57 F.2d 479, 483 (8th Cir. 1932); 7 *J. Moore, Federal Practice* ¶65.10[1], at 65-98 (2d ed. 1975); Note, *Recovery of Damages on Injunction Bonds,* 32 Colum. L. Rev. 869, 871 (1932). The Court of Appeals for the Second Circuit summarized the rule as follows (Judge Learned Hand, joined by Judges Augustus Hand and Chase):

> "Any one who acts honestly and does not subject himself to a charge of malicious prosecution is as free from liability in invoking the action of a court as the court itself, and what he does under its order is not a wrong. The party aggrieved has no remedy except in so far as the court may have protected him by bond or otherwise, as a condition upon the order, and as security against its own errors." *In Re Spencer Kellogg & Sons,* 52 F.2d 129, 135 (2d Cir. 1931).

Under this rule, the maximum liability of NMU with respect to the preliminary injunction is the amount of the $10,000 bond. As already described, this bond runs solely in favor of Commerce.

I have not made detailed findings with respect to the damages of Commerce resulting from the injunction. However, it is clear that such damages are in excess of $10,000. I hold that Commerce is entitled to judgment against NMU for $10,000 in 71 Civ. 582.

Since there is no bond in favor of Vantage, I hold that the

complaint of Vantage in 72 Civ. 4619 must be dismissed. *Benz v. Compania Naviera Hidalgo, S.A.*, 205 F.2d 944, 948 (9th Cir.), *cert. denied*, 346 U.S. 885 (1953).

Commerce and Vantage assert that the preliminary injunction was entered under Section 7 of the Norris-LaGuardia Act, 29 U.S.C. §107, and that damages in excess of the bond are recoverable under this statute, citing the Third Circuit decision in *United States Steel Corp. v. United Mine Workers*, 456 F.2d 483 (3d Cir.), *cert. denied*, 408 U.S. 923 (1972). No extensive discussion of this point is necessary. In the proceedings before Judge Frankel, there appears to have been no reference to Section 7 of the Norris-LaGuardia Act. Both Commerce and Vantage, in their papers filed at the time, treated the application for preliminary injunction as being under Fed. R. Civ. P. 65. In any event, the weight of authority is contrary to the Third Circuit view, and holds that Norris-LaGuardia Act §7 does not depart from the common law rule limiting recovery to the amount of the injunction bond. *Associated General Contractors v. Illinois Conference of Teamsters*, 486 F.2d 972, 975 (7th Cir. 1973); *Int'l Ladies Garment Workers Union v. Donnelly Garment Co.*, 147 F.2d 246, 252-53 (8th Cir.), *cert. denied*, 325 U.S. 852 (1945). *See also Hoh v. Pepsico, Inc.*, 491 F.2d 556, 560 (2d Cir. 1974); *Detroit News Pub. Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

Miscellaneous Claims

The foregoing discussion is sufficient to dispose of the claim of Commerce and Vantage that NMU induced the breach of the contract for the sale of the Barbara. In other words, the answer to this claim is that the proximate cause of the asserted injuries was the preliminary injunction, and the remedy of Commerce and Vantage is limited to the injunction bond.

Vantage's contention that it is entitled to damages because NMU violated New York's Donnelly Anti-Trust Act can be disposed of on the basis of the clear holding in *Connell Construction Co. v. Plumbers and Steamfitters Union No. 100,* 421 U.S. 616, 635-37 (1975), that, even if there is no exemption from *federal* antitrust laws, there could be no application of state antitrust laws in a setting such as the present case.

With respect to NMU's contention that all claims of Commerce and Vantage are barred by the 1973 settlement between these parties, I reject this defense. The releases exchanged between the parties expressly reserved the rights of Commerce and Vantage against NMU.

Conclusion

The counterclaims of Commerce against NMU in 71 Civ. 582 are dismissed, except that Commerce is entitled to judgment against NMU on the second counterclaim in the amount of $10,000.

The complaint of Vantage in 72 Civ. 4619 is dismissed.

No costs are awarded as against any party.

NMU is directed to submit appropriate judgments.

So ordered.

Dated: New York, New York
March 31, 1976

s/ Thomas P. Griesa
THOMAS P. GRIESA
U.S.D.J.

FOOTNOTES

1. Article I, Section 2 reads as follows:

> "Section 2. Sale and Transfer of Vessels. (a) The Company agrees with respect to any vessel which is presently under or may hereafter come under this Agreement, that if during the term of this Agreement said vessel is sold or transferred in any manner to any other business entity not covered by this Agreement for operation under United States flag (but not including a vessel which the Company bareboat charters and the charter is terminated), said vessel shall be sold or transferred with the complement of employees who either are or shall be provided by the Union in accordance with the terms of this Agreement, or such number as may be agreed upon between the Union and the transferee. The term 'transfer' shall be construed to include any chartering of a vessel by the Company.
>
> "(b) The Company obligates itself to obtain for the benefit of the Union a written undertaking with the Union to be executed by the business entity to which the vessel has been sold or transferred that for the full term of the Agreement all of its terms and provisions shall apply to said vessel except as hereinabove provided and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto to preserve the jobs and job rights of the Unlicensed Personnel covered by this Agreement and to protect and maintain the wages, pension rights

and other economic benefits and working conditions provided such personnel under this Agreement.

"(c) The Company agrees that if it desires to sell, bareboat charter or in any manner whatsoever transfer a vessel to another business entity, whether for United States flag or Foreign-flag registry, timely written notice to the Union must first be given prior to any such sale or transfer.

"(d) This Section shall be deemed of the essence of the Collective Bargaining Agreement and in the event of any violation, the no-strike provision of this Agreement shall not be applicable."

2. Originally Commerce and Vantage contended that they would be entitled to damages under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185. However, this section relates to suits "for violation of contracts between an employer and a labor organization." Neither Commerce nor Vantage is suing NMU on such a cause of action.

3. United States intercoastal trade and certain other trade has been limited by law to United States flag vessels.

4. The guarantees turned out to be somewhat illusory. By 1972 the companies were behind in their contributions by several million dollars. NMU forgave the deficiency.

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of June, one thousand nine hundred and seventy-seven.

Present:

HON. J. EDWARD LUMBARD,

HON. WILFRED FEINBERG,
Circuit Judges.

HON. ALBERT W. COFFRIN,
District Judge.

Filed June 15, 1977
Daniel Fusaro, Clerk

National Maritime Union of America, AFL-CIO,

Plaintiff-Appellee,

v.

Commerce Tankers Corporation,

Defendant-Counterclaimant-Appellant,

and

Order Denying Rehearing

Vantage Steamship Corp.,

Intervening Defendant-Appellant.

Vantage Steamship Corp.,

Plaintiff-Appellant,

v.

National Maritime Union of America, AFL-CIO,

Defendant-Appellee.

76-7217

A petition for a rehearing having been filed herein by counsel for the appellant Commerce Tankers Corporation,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

In The

Supreme Court of the United States

October Term, 1977

No. 77-376

COMMERCE TANKERS CORPORATION and VANTAGE STEAMSHIP CORP.,

Petitioners,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Respondent.

APPENDIX

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APPENDIX A

Rule 65, Federal Rules of Civil Procedure

Rule 65. Injunctions

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing, Duration.

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed

forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security.

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

Appendix A

(d) Form and Scope of Injunction or Restraining Order.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee; Interpleader; Constitutional Cases.

These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C., §2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C., §2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

Rule 65.1, Federal Rules of Civil Procedure

Rule 65.1. Security: Proceedings Against Sureties

Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or

undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

APPENDIX B

Norris-LaGuardia Act §7, 29 U.S.C. §107

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect —

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, associations, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: PROVIDED, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said

complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

APPENDIX C

In its Brief in Opposition (p. 8-9, n.9), the Union accuses Petitioners of "misstatements" and asserts in effect that the unusual history of the adoption of the NMU restraint-on-transfer clause and the fact that the agreement was entirely "oral" would not have been relevant to the Union's application for a preliminary injunction from Judge Frankel because, the NMU claims, Commerce admitted it was a party to the overall agreement, and Commerce "stipulated" (at trial) that it was bound by that Agreement."*

It is the purpose of this Appendix to set forth that stipulation and relevant excerpts from the trial transcript, consisting largely of attorney colloquy. We reprint them at length and without comment, because in our view, they demonstrate — better than any words Commerce can use — the purposes that an evidentiary hearing before Referee Kheel or Judge Frankel would have fulfilled. Further, they are relevant to an important narrow factual finding by the District Judge, which Commerce claims to be grossly erroneous.**

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* The admission in the pleading called for proof of the terms of the Agreement and the stipulation relates only to the contract as a matter of contract law and stipulates nothing insofar as antitrust or Taft-Hartley is concerned. (18a, *infra*).

** See p. 31a, *infra*.

Appendix C

TESTIMONY OF MEL BARISIC, VICE PRESIDENT, NMU

January 13, 1975

"BY MR. COHEN:

Q. Mr. Barisic, do you know whether or not Commerce Tankers Corporation ever signed an agreement such as Exhibit 13 for identification? A. No, not to my knowledge. That is the job of the research department. I assume they signed.

Q. You assumed? A. Yes.

Q. Have you checked it at any time?

MR. SOVEL: Objection. I think he has answered the question. I think at this point we are reaching a point where he is having argument with the witness.

MR. COHEN: Your Honor, I just started on this.

THE COURT: I will overrule the objection.

Q. At any time have you checked it? A. I just told you.

Q. Is it that you assume it? A. I assume the research department did — has the responsibility.

Q. Do you know whether or not the NMU ever requested the independents, including

Commerce, in 1969 and 1970 to sign off the blue book? A. Yes, the research department did.

Q. How do you know that, Mr. Barisic? A. Because I know that the research department sent out contracts and agreements like that. It is part of their duty.

Q. And requested people to sign? A. Yes.

Q. And do you know whether Commerce ever signed it? A. I said before, I assume they were sent out to them.

Q. Now on January 7, 1971, when you received the memo from Mr. Spector —

Excuse me, what was Mr. Spector's title on January 7, 1971? A. What?

Q. What was Mr. Spector's title on January 7, 1971? A. He was in charge of our research department.

Q. He head [sic] the head of the research department? A. That is right, and he still is.

Q. Was there any discussion whatsoever between you and Mr. Spector as to whether or not Commerce had ever signed off or been requested to sign off on the blue book? A. Not to my recollection.

Q. None to your recollection? A. Right.

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THE COURT: I do not understand why there is any question —

MR. COHEN: Your Honor, there is no question.

THE COURT: It seems to me that the matter of whether Commerce signed the blue book contract should be beyond any dispute. The question of whether the union sent out specifically or anybody sent out specifically to Commerce for Commerce's signature should be beyond dispute. Maybe it isn't in the stipulation — I don't know.

MR. SOVEL: Your Honor, May I make a statement without being accused of testifying? No one has as yet been able to locate the signed copy. There was testimony —

THE COURT: Any signed copies of that 1969 agreement?

MR. SOVEL: By Commerce — the actual blue book, but there was testimony by Mr. Milton Pilalas in their arbitration proceeding that he had signed it.

THE COURT: Wait a minute. Let us start with the records.

Does the union have the contracts between the union and other people — right?

MR. SOVEL: Yes.

Appendix C

THE COURT: Doesn't the union have copies of the contracts bearing whatever signatures were made?

MR. SOVEL: On many of the companies, yes, in our files, showing copies signed by the various companies.

THE COURT: And is there a book or document signed by a whole lot of companies, or is there an individual thing signed by the individual company?

MR. SOVEL: Normally my understanding is that there is a file for each company's contract in which they have signed.

THE COURT: Each company having signed.

MR. SOVEL: Yes.

THE COURT: And there is no such document for Commerce — right?

MR. SOVEL: Pardon me — one moment. I want to check.

(Mr. Sovel confers off the record.)

MR. SOVEL: I am advised — I will let Mr. Phillips explain this because he has been doing the work on this.

MR. COHEN: I object, your Honor. I am

sorry. What is happening now is a dance around a very important issue.

THE COURT: Nobody is dancing.

MR. COHEN: Well, Mr. Sovel is dancing with you. He said maybe Mr. Phillips knows —

MR. SOVEL: I object to that.

MR. COHEN: — and maybe somebody else knows. I have been on this case for four years, your Honor, and there is no signed agreement with Commerce Tankers. If there was, they would have had to produce it pursuant to the subpoena in the depositions, and they did not produce it.

MR. SOVEL: Now your Honor—

MR. COHEN: And there is no request ever went out from the NMU to Commerce Tankers for the blue book.

THE COURT: The only thing is, we are probably wasting more time than saving it.

But you are asking this witness about facts which to me are matters of record — either the union files contain a signed contract by Commerce Tankers or they don't. If the union files do not contain the contract signed by Commerce, I assume none exist, or unless they have had a fire there, and if there is some form of — if there were contracts sent out to companies

for them to sign, I will assume there was an enclosure letter that there would be copies of those enclosure letters addressed to every company to whom such a request was made.

If that is the case, and if no such enclosure letter or copy thereof is contained for Commerce Tankers, I assume that none ever existed, unless there was a recent fire.

Now these are things that I do not see any reason why we have to have Mr. Barisic on the stand, asking him about it.

MR. PHILLIPS: Your Honor, may I be heard?

THE COURT: Yes.

MR. PHILLIPS: We do not have a blue book, a signed blue book in the union files — period.

THE COURT: For what — for anybody?

MR. PHILLIPS: Just the blue book. No, we don't have it for Commerce.

THE COURT: Okay. But you have it for others?

MR. PHILLIPS: Let me address myself to Commerce. We do have signed memoranda of understanding for various periods of negotiations.

What happened, your Honor, was that the first portion of the negotiations was completed — that was the economic package that was sent out. We have a signed copy from Commerce as to their agreement with that.

Then other portions of the contract were agreed to. Memoranda was sent out and returned, signed by Commerce.

We do not have any specific blue books signed by Commerce, nor do we have any specific signature by Commerce with respect to artiel [sic] 1, section 2.

THE COURT: Was there a memorandum of understanding relating to that portion of the contract involving article 1, section 2?

MR. PHILLIPS: No, your Honor.

THE COURT: Then there was none sent to anybody?

MR. PHILLIPS: None, no.

THE COURT: Let me just start again.

According to what you say, during the negotiations there were various memos of understanding that were gotten up at different stages.

MR. PHILLIPS: Correct.

Appendix C

THE COURT: And there was a memorandum of understanding about the economic package.

MR. PHILLIPS: That is correct.

THE COURT: And that was sent out, among other people, to Commerce.

MR. PHILLIPS: Yes, your Honor.

THE COURT: And Commerce signed it.

MR. PHILLIPS: Yes, sir.

THE COURT: And you have a copy of that?

MR. PHILLIPS: Yes, your Honor.

THE COURT: Okay.

Now as far as article 1, section 2 is concerned, at whatever stage of the negotiations that occurred, there was another memorandum of understanding.

MR. PHILLIPS: That is correct, your Honor.

THE COURT: Signed by anybody.

MR. PHILLIPS: Correct, your Honor.

THE COURT: Or presented.

MR. PHILLIPS: Correct, your Honor.

THE COURT: So the only thing embodying article 1, section 2 was the final blue book.

MR. PHILLIPS: That is correct, your Honor.

THE COURT: Now you have contracts embodying the blue book — the final blue book terms signed by a number of companies.

MR. PHILLIPS: Correct, your Honor.

THE COURT: But not Commerce.

MR. PHILLIPS: That is right. However, as to that, I believe the head of Commerce, the president of Commerce, Mr. Pilalas testified by way of testimony—

THE COURT: But you do not have any documents which you can produce.

MR. PHILLIPS: No.

THE COURT: Okay. Now in the case of any of these companies do you have letters to them or copies of letters asking them to sign the final blue book contract?

MR. PHILLIPS: Yes, your Honor.

THE COURT: Do you have any copy of letters addressed to Commerce?

MR. PHILLIPS: No, your Honor.

THE COURT: Okay. Well, at least we know what the documentation is.

MR. COHEN: I am sorry, but did you say you had those letters?

THE COURT: They have letters to some companies but not Commerce.

MR. COHEN: Let us establish this correctly.

We have lawyers here talking as if they were witnesses.

Mr. Phillips, is it your understanding that letters were sent out for people to sign the blue book?

MR. PHILLIPS: That is my recollection.

MR. COHEN: Well, I think it would help this case an awful lot if Mr. Sovel and Mr. Phillips would bring those letters to the court tomorrow.

THE WITNESS: What kind of letters are you talking about?

MR. COHEN: The letters requested of the independents to sign off the blue book.

THE COURT: I take it you are requesting production.

MR. COHEN: Yes.

THE COURT: Okay, you request it."

Record, 412a - 421a

TESTIMONY OF MR. BARISIC CONTINUED

Morning, January 14, 1975

"MR. COHEN: Your Honor, there was a request yesterday for the production of certain documents by the NMU. I wonder if they have them with them today. There was a request for the production of the blue book Mr. Phillips represented went out.

MR. SOVEL: I do not have that document with me as yet. I will try to have it this afternoon.

THE COURT: Go ahead.

MR. SOVEL: If your Honor please, may I interject one thing? We will get people to dig out documents, but since in their answer they have admitted the execution of the contract, I fail to see what the issue we are pursing [sic] with this thing is?

MR. COHEN: Your Honor, I think we are pursuing a very, very clear issue.

We admit the existence of a contract imposed upon us by the NMU having reached agreement with other persons. The fact that

neither Commerce nor any of the other independents was offered an opportunity to accept or reject the clause is the essence of the antitrust violation that was committed.

THE COURT: Can you answer me this, and I have not looked at the pleadings — I'll look at them right now if you want me to — as a matter of contract law and putting aside for the moment labor law problems or antitrust problems, what is your position as to whether Commerce Tankers was bound by the 1969 collective bargaining agreement with the NMU?

If that's not a fair question, tell me so.

MR. COHEN: I understand your Honor's question. I hesitate to get into the full impact of the issues that arise with respect to both the labor law and the antitrust law but understanding your Honor's question directly relates solely to the contract as a matter of contract law, I feel that once Commerce received the booklet, had knowledge that the NMU intended it be imposed upon it and live under other provisions of the booklet, it became its contract as a matter of fact.

THE COURT: Subject to whatever rights Commerce would have under the Taft-Hartley Act or the antitrust laws, right?

MR. COHEN: Exactly.

THE COURT: All right.

Then I think that clarifies the nature of the issues Mr. Cohen is pursuing. Those documents I think —

MR. SOVEL: I will get the accurate information on it but it seems to me paragraph 5 of the answer admits the defendants entered into a collective bargaining agreement and respectfully refers the Court to the proof of the terms of the conditions thereof.

THE COURT: That seems to me to be consistent with the answer Mr. Cohen has just given me. I don't think that answer would waive the other questions that Mr. Cohen wants to bring up.

MR. COHEN: I want to say specifically on the record that had I been aware of the specific facts on February 8, 1971, when we were before Arbitrator Kheel, and had I not been led into believing that there was an executed blue book in existence, I certainly would have raised the equitable arguments that arise out of the imposition of a contract without the opportunity of acceptance and rejection of the particular instrument.

THE COURT: I don't think we need to get into that.

MR. SOVEL: I must voice an objection. No one led Mr. Cohen to believe. Mr. Cohen, supposedly a competent lawyer, didn't look at his own documents. I object to him telling me I

made misrepresentations to the Court. The man wants to come in and say I am incompetent and at fault, that is an outrageous situation for any lawyer to have to put up with.

THE COURT: Let me try to put it in a little softer manner.

I think as of the time of the arbitration no lawyer would have gone into the matter with the immense depth with which the matter has been gone into by this time, so, in other words, a lawyer might thing [sic] as this litigation went on a lot more than he would think of immediately before Arbitrator Kheel. That's about all you are saying and I think that's a natural thing.

Let's go on."

Record 455a-458a

CROSS-EXAMINATION OF MR. BARISIC

Afternoon, January 14, 1975

"MR. KLEIN: I believe Mr. Sovel undertook to provide us this afternoon copies of certain letters sent to the independent companies pursuant to Mr. Cohen's request.

MR. SOVEL: I don't know that I undertook to do it this afternoon. We have not been back to the office, since we had lunch in the same restaurant.

Appendix C

MR. KLEIN: Your Honor —

MR. SOVEL: I thought the question of relevancy was determined. I will get whatever we have got.

THE COURT: You said you would produce all of that material and I thought this morning you said you would produce it this afternoon. It is not here. We will have to work around that.

They don't have it here.

When can you have it here?

MR. SOVEL: Very definitely tomorrow morning.

THE COURT: All right, tomorrow morning.

Let's go on to something else."

Record 487a

TESTIMONY OF EDWARD SILVER, CHIEF NEGOTIATOR FOR MARITIME EMPLOYEES ASSOCIATIONS

January 15, 1975

"Q. Did you ever sign a copy of the blue book? A. I don't believe so.

Q. Do you know whether any of your

constituents, the members of the Tanker Service Committee, have executed the blue book? A. I don't know whether they have signed the blue book, no.

Q. Directing your attention now to Article I, Section 2 of the blue book, are you familiar with that section? A. Yes, I am.

Q. Did you ever sign a memorandum of understanding with the National Maritime Union on behalf of either the MSC or TSC incorporating the provisions of Article I, Section 2? A. Not myself, no.

Q. Did anyone else? A. It could be that my partner, Mr. Oppenheimer did.

MR. COHEN: I have never seen any such document, Mr. Sovel. I request you produce it.

Q. Article I, Section 2 is called the sale and transfer clause or the restrain on transfer clause. A. Called the sale on transfer clause.

MR. SOVEL: If your Honor please, in response to Mr. Cohen's last statement I am advised we have no such document.

THE COURT: Does that mean there was no such document signed?

MR. SOVEL: It does not mean that. It means when the blue book was printed up the underlying documents were destroyed.

MR. COHEN: I object to that.

THE COURT: You don't have anything in the memos of understanding?

MR. SOVEL: I am only answering a question that was directed to me.

THE COURT: It is a matter of record.

MR. SOVEL: The documents, as I understand it, they drafted after the blue book was printed up Mr. Oppenheimer, Mr. Phillips, there was a proofreading session and when they were done the blue book came into effect and the memos which were the initial documents which they had were discarded.

We do not have them. Maybe Mr. Oppenheimer does. I don't.

THE COURT: Let's go ahead. Develop the evidence.

MR. SOVEL: Excuse me. As I understand, they were kept over a year and we do not have them now.

THE COURT: You develop the evidence.

MR. COHEN: I must say on the record that I would object to any use of the representations that are being made now as evidence in this case and I believe —

Appendix C

THE COURT: Unless something is stipulated, I won't accept it.

MR. COHEN: Thank you.

THE COURT: I think we do have a concession which is binding on the union, that they have no copies of any such memo.

MR. SOVEL: At this time.

Excuse me. One minute. I want to check with the people who may have more direct knowledge of this than I do.

THE COURT: All right.

(Pause.)

MR. SOVEL: If your Honor please, Mr. Spector wants to try to give you a final, complete, binding answer on that. He wants to check certain files he may have in his office to report back on that to see if there is any additional documents that might relate to this.

THE COURT: I cannot believe that the union does not know categorically whether or not there was a memorandum of understanding executed covering Article I, Section 2.

You find that out and find out if it ever existed or if it still exists. You will report to us."

Record 531a-533a

Appendix C

TESTIMONY OF EUGENE SPECTOR, RESEARCH DIRECTOR, NMU

January 20, 1975

"Q. As of January, 1971, had any company in the maritime industry acknowledged in writing a willingness to comply with Article I, Section 2 of the NMU collective bargaining agreement?

MR. SOVEL: Objection, your Honor, and we are back to something that we had a lot of business on at the beginning of the trial, Commerce had been [sic] admitted being a party to the collective bargaining agreement. I don't see what this has to do with the agreement in view of the collective bargaining situation.

THE COURT: I will overrule that objection. I am puzzled by your question. You asked if 'any company' in the industry had acknowledge [sic] in writing, what?

MR. COHEN: A willingness to comply with Article I, Section 2, sale and transfer clause of the NMU —

THE COURT: Didn't Mr. Silver sign on behalf of the TSC?

MR. COHEN: His testimony was that he did not, but he was sure somebody had. At that time I requested production of any agreements where anybody had, and we got into —

THE COURT: Let's just get it in a little

more simple context. If your question is whether anybody signed the agreement embodying the blue book, that's a simple question.

Did anybody sign this thing?

THE WITNESS: What date, your Honor?

Q. January, 1971, Mr. Spector. A. No, sir.

Q. Isn't it a fact, Mr. Spector, that nobody was asked to sign this agreement until after the Article I, Section 2 clause was upheld as valid by the trial examiner?

MR. SOVEL: Objection, your Honor.

THE COURT: Wait a minute. Are you telling me that nobody signed the blue book?

THE WITNESS: Your Honor, if you wanted the chronology of what happened —

THE COURT: I am not asking about a chronology. I thought you told me a minute ago that nobody signed the blue book.

THE WITNESS: At that point in time.

THE COURT: I want to see if I am hearing correctly.

THE WITNESS: That's correct, sir. As of that point in time.

Appendix C

THE COURT: What time?

THE WITNESS: January 1971.

THE COURT: Next question.

Q. Isn't it a fact, Mr. Spector, that no one was asked to sign the blue book at any time prior to January of 1971? A. That's correct, sir.

Q. And that's also true as to the green book which covers the dry cargo carriers? A. I believe that's correct, sir.

Q. And isn't it a fact, Mr. Spector, that in September of 1971, requests were made of the tanker and dry cargos to sign off on the blue book and green book? A. Yes, my office sent out letters.

Q. And that was the first time it was ever done? A. That's correct.

Q. Was the blue book sent at that time to Commerce Tanker Corporation? A. It was.

Q. It was? A. Yes, sir.

Q. Was it returned? A. It was not returned."

Record 979a-982a

Appendix C

TESTIMONY OF MR. SPECTOR CONTINUED

Later January 20, 1975

"THE COURT: What I am not clear about is your formalities. It would seem to me just at first blush if you are going to have a contract with somebody, you get them to sign it.

THE WITNESS: Every signatory company to an NMU tanker or dry cargo agreement, signed that basic agreement, '61 agreement, as amended in '63. Subsequent arbitration clause and subsequent arbitration awards and subsequent memorandums of understanding which amended that agreement, so that we had a book, a contract package which was about that thick (indicating) by 1968.

THE COURT: Containing the contract documents?

THE WITNESS: Yes, the basic agreement and amends to that basic agreement.

THE COURT: In other words, you had the signatures of very [sic] company that you said had a collective bargaining agreement with the NMU?

THE WITNESS: That's correct, sir.

THE COURT: Now, you didn't do that for the '69 negotiated contracts?

THE WITNESS: Yes, sir.

THE COURT: Why didn't you do it?

THE WITNESS: That was my fault. That was the first collective bargaining agreement negotiated with myself as research director, and I was asked, when the contract was concluded, to put it in shape, make a table of contents, and to rearrange the subject matter in a more logical sequence, which I did.

It was then sent to the printers. The printers sent it back to my office, and I distributed it to the companies, to the union, had it put aboard the vessels, but did not know that it was my responsibility to send it out for signature, and somewhere along the line, it was brought to my attention, we do not have signed agreements on the blue book.

THE COURT: When was that brought to your attention?

THE WITNESS: It was brought to my attention around August or early September of '71. I said, 'Well, I didn't know I was supposed to do this.'

THE COURT: Who brought that to your attention?

THE WITNESS: I don't recall how it arose. It probably resulted in terms of Mr. Barisic asked me a question of our general counse, [sic] and a check of the contract files showed that we had the memorandum of understanding and we had the blue books but we had no signed agreements.

They said 'Send them out and get them signed.'

And I sent them out in September, I think it was September 7th and then for those companies that did not return them, I followed up with a second letter and sometimes a third letter, and eventually, by the end of '71, or early '72, we had signed agreements from all companies.

THE COURT: But you didn't get one from Commerce?

THE WITNESS: No. Commerce did not send one.

THE COURT: Okay. Go ahead.

BY MR. COHEN:

Q. Did Mr. Phillips tell you about the lack of a signed blue book from Commerce in early '71? A. He might have. I don't recall.

Q. Didn't he tell you that was a problem in connection with the arbitration? A. He asked for the Commerce Tanker file and I provided him with that file. As to any discussions we had about it, I do [sic] do not recall any discussions along those lines. I did not participate in the arbitration and did not keep myself abreast of what was happening in that respect."

Record 1019a-1021a

Appendix C

District Judge Griesa found that the NMU's failure to request the companies to sign the final agreement or any memorandum indicating their assent to it was "due to an oversight by NMU personnel." (Pet. 45a-46a).* Commerce contends that this finding is grossly erroneous, and that it may, and can be corrected by this Court on review.

To believe that the NMU personnel committed an "oversight," it is necessary to deal with the following facts:

(1) The maritime unions initially proposed to the MSC and TSC that agreement to this clause was the number 1 condition for commencement of negotiations (Record, E68).

(2) There is a total void of documentary or credible testimonial evidence to demonstrate that the clause or its complex ramifications was openly discussed by the NMU with anyone other than Mr. Silver.

(3) The Union carefully obtained the signature of all the independent employers to the most miniscule of other terms, only neglecting "restraint-on-transfer."

(4) The Union also omitted to get Mr. Silver's signature to this clause.

(5) In February of 1970, the NMU circulated a printed book version of its new contract to all employers. These books contained Article I, Section 2. At the time they were distributed, no accompanying letter was sent out, no request for signature of

* A far more rational explanation for the Union's conduct is, Commerce contends, that it realized even then that the clause was unlawful under Section 8(e), and that any "request" to the companies to sign off on the clause might constitute a violation of §8(b)(4) and result in a testing of the validity and the Union's exposure to monetary damages under 303 of the LMRA.

the employers was made, and no form of acquiescence by Commerce or any company was asked for or received.

In his decision of preliminary injunction, Judge Frankel found: Commerce, "Along with others in the shipping industry, has had 20 months or so in which to seek the Labor Board's authoritative judgment as to whether the disputed provision of the June, 1969 agreement is unlawful." In fact, however, neither Commerce nor anyone else in the shipping industry could make any complaint until they had been requested to agree to the clause, or it was otherwise enforced. As of January of 1971, when the NMU commenced its enforcement of the Restraint-on-Transfer clause against Commerce, not a single employer in the industry had agreed, or even been requested to agree, to the clause.

Thus, the emergency that arose with the Vessel BARBARA was not a mere accident. It was inevitable that someone would make the mistake of trying to sell an NMU ship to an SIU-contracted company. Once that was to happen — notwithstanding whether the illegal undertaking was excluded or included in the contract of sale — the transaction would have been frustrated by the inevitable conflict between the fleetwide doctrine and the restraint-on-transfer provisions.

IN THE

Supreme Court of the United States

October Term 1977

No. 77-376

COMMERCE TANKERS CORPORATION and
VANTAGE STEAMSHIP CORP.,

Petitioners,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, IN OPPOSITION

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The Opinions Below, Statement of Jurisdiction, and the Questions Presented by petitioners are set forth in the petition. NMU's Statement of the Case is set forth in NMU's own petition for certiorari in this case, No. 77-358.

ARGUMENT

I.

The Court of Appeals Properly Limited Recovery for the Wrongful Injunction to the Amount of the Injunction Bond.

1. The decisions of this Court have uniformly limited recovery for wrongful injunction to the amount of the injunction bond. *Russell* v. *Farley*, 105 U.S. 433 (1881); *Meyers* v. *Block*, 120 U.S. 206 (1887); *Minneapolis, etc. Ry.* v. *Washburn Lignite Coal Co.*, 254 U.S. 370, 374 (1920); *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 278 U.S. 228 (1929). These decisions in turn, as the opinions disclose, rest on even more venerable doctrine, both in this country and England.[1]

2. This firmly established principle—known as the injunction bond rule—has been applied in innumerable cases by the Courts of Appeal and District Courts, including decisions rendered as recently as this year. *E.g.*, *Adolph Coors Co.* v. *A & S Wholesalers, Inc.*, 1977-2 CCH Trade Cases ¶ 61,565 (10th Cir. 1977); *Associated General Contractors* v. *Illinois Conference of Teamsters*, 486 F.2d 972, 975 (7th Cir. 1973); *First-Citizens Bank & Trust Co.* v. *Camp*, 432 F.2d 481 (4th Cir. 1970); *Atomic Oil Co. of Oklahoma* v. *Bardahl*, 419 F.2d 1097 (10th Cir. 1970), *cert. den'd*, 397 U.S. 1063 (1970); *Benz* v. *Compania Naviera Hidalgo, S.A.*, 205 F.2d 944 (9th Cir. 1953); *International*

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[1] Inasmuch as the District Court granted judgment against NMU for the full amount of the injunction bond, the fact that the entire judgment ran in favor of Commerce, the sole party enjoined by the preliminary injunction and therefore the sole obligee under the bond, is irrelevant. The allocation of this award is a matter between Commerce and Vantage.

Ladies Garment Workers Union v. *Donnelley Garment Co.*, 147 F.2d 246 (8th Cir. 1945), *cert. den'd*, 325 U.S. 852; *United Motors Service, Inc.* v. *Tropic-Aire, Inc.*, 57 F.2d 479, 483 (8th Cir. 1932); *In re Spencer Kellogg & Sons*, 52 F.2d 129, 134-135 (2d Cir. 1931). *Donnelley*, *Benz* and *Associated General Contractors* are labor cases.

3. The doctrine has also been recognized by all commentators. See 7 Moore's Federal Practice ¶ 65.10 at 65.98-99. Each of the articles or notes cited at p. 7 of the petition recognizes the universality of the rule.

4. The only judicial authority relied on by petitioners is the decision of the Third Circuit in *United States Steel Corp.* v. *United Mine Workers*, 456 F.2d 483 (3d Cir. 1972), *cert. den'd*, 408 U.S. 923, which is, however, plainly distinguishable from the decision below. In *United States Steel*, the Third Circuit acknowledged that the injunction-bond rule was well-established, but held it inapplicable to a claim based on Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107, and made by a union that had been improperly subjected to a preliminary injunction against striking. The Court noted that, in contrast to Rule 65 FRCP, Section 7 expressly referred to counsel fees. The Court then concluded that a temporary injunction improperly issued in a labor dispute and directly contravening the express provisions of Section 4 of the Norris-LaGuardia Act, would under Section 7 of that Act, subject the plaintiff in the injunction action to liability for attorneys fees, even though these fees were greater than the amount of the injunction bond.[2]

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[2] The Third Circuit did review three of the four Supreme Court cases cited above, characterizing the statement of the injunction bond rule in each of those cases as dictum. The Third Circuit opinion did not mention *Meyers* v. *Block*, *supra*, in which this Court clearly stated (120 U.S. at 211):

> "By the law of Louisiana, damages may be recovered for suing out an injunction without just cause, independently of a bond.

The indispensable basis for the Third Circuit's decision was the applicability of Section 7 of the Norris-LaGuardia Act. Section 7 does not, however, operate in this case, and it is presumably for that reason that petitioners, in footnote 6 of the petition, disclaim reliance on the Norris-LaGuardia Act, thus disclaiming reliance on the Third Circuit's *ratio decidendi.* Under the decisions of this Court it is clear that Section 7 of the Norris-LaGuardia Act does not apply to actions to enforce agreements to arbitrate *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 457-459 (1957). Furthermore, under the decisions of this Court, an action to enforce an arbitration award, e.g., an award that a strike violates a no-strike pledge, is not subject to the Norris-LaGuardia Act. See *Boys Market, Inc.* v. *Retail Clerks, Local 770,* 398 U.S. 235 (1970) at 244, n. 10; *Buffalo Forge Co.* v. *United Steelworkers of America,* 428 U.S. 397 (1976) at 405-407, 425, n. 18 (dissenting opinion). Judge Frankel's injunction herein enforced an arbitration award and was issued in an action seeking precisely that relief. Accordingly, *United States Steel* is inapplicable to the instant case and not in conflict with the decision below. Any conflict between the Third Circuit in that case and the Seventh Circuit in *Associated General Contractors* v. *Illinois Conference of Teamsters, supra,* would not support the instant petition.

5. The reasoning behind the injunction bond rule has been explicated in many of the decisions applying it. See,

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3 La. 291. But this can not be done *in the United States courts.* Without a bond, no damages can be recovered at all. Without a bond for the payment of damages or other obligations of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. *It is only by reason of the bond and upon the bond, that he can recover anything.*" (Emphasis supplied).

for example, the opinion of Judge Learned Hand in *In re Spencer Kellogg & Sons, supra,* 52 F.2d at 134-135, and that of Judge Cardozo in *City of Yonkers* v. *Federal Sugar Refining Co.,* 221 N.Y. 206 (1917). The courts have made clear that among other objectives of the rule, it enables a litigant to know his monetary exposure in the event a preliminary injunction sought by him is subsequently reversed, so that, in Judge Cardozo's words, 221 N.Y. at 209, "he counts the cost, and assumes a liability whose maximum is a determinate amount"; and if the amount fixed seems not worth the risk, he may decline to translate the proffered injunction into an effective judicial command.

The considerations behind the injunction bond rule operate with special force in the labor arbitration context. This Court has held that good faith resort to contractual arbitration is to be fostered by the national labor policy. To deny a union or an employer, acting in good faith, the protection of the injunction bond rule would chill resort to arbitration and increase resort to self-help, and would, accordingly frustrate the national policy.

The requirement of an injunction bond and the imposition of liability to the extent of the bond is itself an exception to the basic concept underlying our system of justice, that good faith recourse to the courts does not carry a price-tag and that good faith litigants are not held responsible for the consequences of judicial error. Given the national policy in favor of labor arbitration, it would be startling and perverse in this case to extend that exception beyond its historic limits.

For over a century, litigants, like the NMU herein, have relied on the injunction bond rule. If reexamination of this long-standing, well-settled rule be deemed appropriate—and petitioners, we submit, have made no showing that it is—the proper method is by prospective amendment of

Rule 65 FRCP or by Congressional legislation and not by a retroactive abolition of a rule on which parties have long justifiably relied.[3] It is ironic, indeed, that a petition that invokes due process should call for a retroactive change that would operate harshly and unfairly on a labor union, a member of the class that Norris LaGuardia was designed to protect against procedural unfairness and judicial policy making.

II.

The Application of the Injunction Bond Rule Did Not Deprive Petitioners of Due Process.

Petitioners also urge that "under the peculiar circumstances of this case" the application of the injunction bond rule deprived them of procedural due process. Such a narrow factual claim, already rejected by two courts, does not present an issue of general importance warranting review by this Court.

In any event, petitioners' contentions are wholly without merit. The petition distorts the factual record and misconceives the governing legal standards. The record makes it clear that the proceedings resulting in Judge Frankel's

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[3] Petitioners criticize decisions dispensing with the bond requirement altogether, particularly in "public interest" cases, and question whether federal courts should inject themselves into controversies at a "preliminary" stage. This private lawsuit in which a bond *was* required and judgment *was* rendered for its full amount is hardly an appropriate vehicle for exploring the issues suggested by petitioner. Nor do we believe petitioners seriously suggest that this Court consider the total elimination of the preliminary injunction from the arsenal of available judicial remedies.

preliminary injunction did not abridge constitutional rights.[4]

The arbitration before the contractually designated arbitrator, Mr. Theodore Kheel (insultingly referred to in petitioners' footnote 11 as "its [NMU's] arbitrator"), was commenced on January 25, 1971, by written demand served upon Commerce, which had been preceded by written and oral reminders of the "sale and transfer" clause of the collective agreement.[5] Two full weeks elapsed between the arbitration demand and the arbitration hearing on February 8, 1971. At that hearing Commerce, represented by two attorneys, admitted that it had contracted to sell the S/S Barbara in violation of its agreement with NMU but sought a further adjournment to brief issues as to the validity of the agreement. No contention was made then or afterward that Commerce was unaware of the matter to be arbitrated. Since under prevailing law the claimed invalidity of the agreement was beyond the arbitrator's jurisdiction, Mr. Kheel, faced with an admission regarding the only question properly before him, issued an award in favor of NMU.

That award did not have the force of a judicial command and would not have prevented a sale of the vessel. Accordingly, the NMU promptly sought judicial confirmation in the federal district court.[6] Although Rule 65(b) expressly

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[4] A chronology of events was stipulated at trial and appears in the Appendix below commencing at 1312a. The pertinent pleadings, motions, affidavits, exhibits and orders resulting in Judge Frankel's injunction are contained in that Appendix at 1a-134a.

[5] No notice was sent to Vantage because Vantage was not a party to the NMU contract or to any arbitration agreement with NMU.

[6] Vantage was not made a party to the NMU confirmation proceeding because no arbitral award was issued against it and no judicial relief was sought against it. However, Vantage promptly moved to intervene, and its motion was granted several days prior

contemplates the issuance of *ex parte* temporary restraining orders, NMU gave telephonic notice to Commerce's counsel of its intent to seek such an order.[7] Commerce was in fact represented by counsel at the hearing before Judge Wyatt on NMU's application for a temporary restraining order, as Judge Wyatt's order specifically recites. The counsel so notified was the same attorney who had represented Commerce in the making of the contract with Vantage and who had been co-counsel for Commerce at the arbitration hearing the preceding day.

The order to show cause initiating the proceeding to confirm the award was signed, served and filed on February 9, 1971. The hearing before Judge Frankel took place on February 23rd.[8] During the intervening two weeks, both Commerce and Vantage submitted affidavits opposing the NMU's motion[9] and memoranda of law dealing

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to the hearing before Judge Frankel. Vantage participated fully in that hearing, through affidavit, memorandum of law, and oral argument. Judge Frankel's injunction restrained Commerce only, not Vantage, and that was undoubtedly the reason why the injunction bond ran in favor of Commerce alone. Vantage did not object to this aspect of the bond.

[7] Telephone notice of applications for temporary restraining orders conformed to the procedure in the Southern District of New York.

[8] In another unworthy distortion of the facts, petitioners assert (Pet. p. 13) that when Judge Wyatt vacated his own TRO, "NMU applied before a different federal judge" for a preliminary injunction. In 1971 in the Southern District of New York, cases were not assigned to a single judge for all purposes. Judge Wyatt was the assigned *ex parte* judge and Judge Frankel was sitting in motion part. NMU did not apply to any particular judge and had nothing to do with the assignment or selection of the judge who heard either its own applications or those of its adversaries.

[9] Nowhere in the submissions to Judge Frankel did the companies claim that Commerce was not bound by the NMU agreement. Indeed, Commerce's affidavit expressly stated that "Commerce is a party to a collective bargaining agreement with the NMU dated

extensively with their antitrust and labor law challenges to the validity of the contractual "sale and transfer" clause.[10]

On February 23rd, Judge Frankel heard full argument from Commerce's and Vantage's respective counsel.[11] His oral restoration of the temporary restraining order was followed by a formal preliminary injunction and a written opinion of nineteen pages.[12]

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as of June 15, 1969." Years later, at the trial of the present action before Judge Griesa, Commerce stipulated that it was bound by that agreement, and Judge Griesa so found. It is unnecessary, therefore, to respond to petitioners' misstatements as to the making and adoption of that agreement, other than to note that all contracting employers, including Commerce, received a copy; none of the employers protested that the document did not represent the agreement reached; and all employers, including Commerce, accepted it as the instrument which prescribed the terms and conditions of employment of their unlicensed seamen.

[10] The affidavits and attached exhibits of the two companies comprise 43 pages of the Appendix in the Court of Appeals. The companies' memoranda of law to Judge Frankel aggregate 76 pages.

[11] Footnote 13 of the petition suggests that the companies did not consent to treating the motion to confirm as a motion for a preliminary injunction. Judge Frankel's initial order was signed on February 24th. On February 25th, Commerce submitted a "counterproposed order" which Judge Frankel signed, superseding the earlier order. On March 18th, Commerce moved to resettle the order and annexed its proposed resettled order, which Judge Frankel declined to sign. Both Commerce's counter-proposed order of February 25th and its proposed resettled order of March 18th recited that "It having been stipulated by the parties that the Court might treat the motion as one for a preliminary injunction. . ."

[12] We emphatically disagree with petitioners' assertion in their footnote 9 that Judge Frankel's characterization of the conduct and motives of the companies was later proven to be unfounded, although, in any event, an erroneous judicial appraisal of the underlying facts would not rise to the level of a deprivation of due process.

The only cases cited by petitioners, *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and *Goldberg* v. *Kelly*, 397 U.S. 524 (1970), only confirm the emptiness of their position. In both cases, no hearing at all was provided, and this Court took pains to emphasize that although minimum due process staples were essential, no particular form of hearing or type of tribunal was constitutionally required. In the instant case, a federal court granted the time-honored remedy of preliminary injunction after notice, submission of affidavits and memoranda, hearing before the Court, and participation of counsel at all stages. Petitioners received more notice than the Federal rules require and a lengthier than usual period to prepare. To assert that this procedure somehow deprived them of due process borders on the frivolous. See *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948); *Brault* v. *Town of Milton*, 527 F.2d 730, 738-739 (2d Cir. 1975).

III.

The Instructions of the Court of Appeals on Remand to the District Court Do Not Conflict With the Decisions of This Court.

1. The brief, interlocutory instructions of the Court of Appeals on remand to the District Court were plainly not intended as a comprehensive statement of the applicable legal standards either under the labor exemption or the rule of reason. For this Court to undertake review of these cursory, general comments at this time would be clearly inappropriate.

2. In any event, the statements of the Court of Appeals are wholly consistent with this Court's decision in *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union*

No. 100, 421 U.S. 616 (1975). Petitioners, at p. 15, refer to a balancing of the interests "favoring collective bargaining" with those "favoring free competition." But the "interests favoring collective bargaining" must themselves be given specific content. Consequently, consideration must be given to the nature and the legitimacy of the purpose of the challenged provision of the collective bargaining agreement. *Connell* itself speaks of such an inquiry. 421 U.S. at 622, 625-626. See also *Meat Cutters, Local 189* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), particularly footnote 5 at 960. A determination that a particular goal represents a legitimate collective bargaining objective does not necessarily end the judicial inquiry, but it is certainly an essential part of that inquiry.[13] That is all the Court below said, and in doing so it plainly conformed to the decisions of this Court.[14]

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[13] We do not think it necessary here to reply fully to footnote 16 of the petition. The reference in the opinion below to the inclusion of the sale and transfer clause in the Commerce-NMU collective bargaining agreement derives directly from *Connell*. There this Court emphasized that the restraint involved was not embodied in a collective bargaining agreement and that the Plumbers Union did not represent, or seek to represent, Connell's employees. This case is poles apart from *Connell*. NMU did represent the seamen aboard the Barbara and had a legitimate interest in continuing to represent them and to protect their rights and benefits under the collective agreement, whether the vessel was owned by Commerce, Vantage, or any other American flag oprator. The purpose of the sale and transfer clause was to protect those interests. On the other hand, nothing in that clause applied to Vantage's other vessels or impinged in any way on Vantage's commercial use of the vessels it already owned.

[14] Out of an abundance of caution, we reiterate footnote 6, p. 9, of our own petition for certiorari, No. 77-358. We there stated that if the shipping companies sought review of antitrust questions in this case (as they now have) and if this Court were disposed to grant such review, our own petition should be deemed to include a request that the Court also review the question of whether the evidence required a dismissal of the Sherman Act claims on the basis of the labor exemption. That antitrust issue,

CONCLUSION

The shipping companies' petition for a writ of certiorari should be denied.

Respectfully submitted,

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unlike the one raised by the companies, presents a question of substantial general importance, is based exclusively on the existing trial record, and if decided in NMU's favor would end the case and obviate the need for any remand to the District Court.

In The

Supreme Court of the United States

October Term, 1977

No. 77-376

COMMERCE TANKERS CORPORATION and VANTAGE STEAMSHIP CORP.,

Petitioners,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Respondent.

REPLY BRIEF OF COMMERCE TANKERS CORPORATION

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COMMERCE TANKERS CORPORATION and VANTAGE STEAMSHIP CORP.,

Petitioners,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Respondent.

REPLY BRIEF OF COMMERCE TANKERS CORPORATION

In this case, Commerce Tankers Corporation ("Commerce") and Vantage Steamship Corp. ("Vantage") (collectively, "petitioners") pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered in the above entitled case on April 15, 1977. Separately, the respondent, National Maritime Union of America, AFL-CIO ("NMU"), has sought certiorari (Docket No. 77-358). The rules of this Court permit a reply brief addressed to arguments first raised in the briefs of opposition (Rule 24).

The Opinions Below, Statement of Jurisdiction, Questions Presented, and Statement of the Case are set forth in the Petition. Additional factual matter and relevant legal arguments are set forth in Commerce's Brief in Opposition filed in Docket No. 77-358.

ARGUMENT

I.

The issues presented and not disposed of by respondent's reference to the Norris-LaGuardia provisions.

Petitioners, relying on the authority of *United States Steel Corp. v. United Mine Workers*, 456 F.2d 483 (3d Cir. 1972), *cert. denied*, 408 U.S. 923, correctly asserted that this case poses a direct conflict between the Circuits on the validity of the so-called injunction bond limitation rule. The NMU distinguishes *United States Steel* on the grounds that the Third Circuit also invoked the plain language of Section 7 of the Norris-LaGuardia Act, 29 U.S.C. §107 in a case only involving counsel fees.[1] Such a narrow reading of the Third Circuit's decision is clearly

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1. The Union argues that §7 does not apply to actions instituted under §301 of the Labor Management Relations Act ("LMRA"). In fact, the extent to which injunctions issues in a labor dispute require an accommodation of the LMRA with §7 of the Norris-LaGuardia Act is not a settled issue. *Granny Goose Foods, Inc. v. Teamster Local 70*, 415 U.S. 423, 445 n. 19 (1974). At the same time, the NMU implies that it "relied on the injunction bond rule" and that any "retroactive" change would operate "harshly and unfairly" on the Union, which claims special "privilege" as a member of a protected class under Norris-LaGuardia. If the provisions of Norris-LaGuardia apply to this labor dispute, the NMU cannot pick and choose the provisions it likes. In any event, *this* Union did not rely on the injunction bond rule. There is no evidentiary support for a claim that the NMU, or its counsel, even knew that such a "rule" existed when they obtained the injunction. (See Petition, p. 10, n. 10.)

inadvisable.[2] There is no meaningful difference in the statutory language requiring a "security bond" in a Rule 65 proceeding and the substantively identical language requiring such a bond in a labor dispute covered by the Norris-LaGuardia Act.[3] Furthermore, there is no legislative history indicating that Congress intended to create such an obtuse distinction, or that Congress ever considered, in enacting either provision, the possibility that the "security" it was demanding of parties urging a court to act preliminarily would serve as a permanent "limit" to the liability of such a party.[4] In any event, Congress, cognizant of the labor implications of provisions for injunctive relief, expressly provided when Rule 65 was adopted, that the Rule does not modify any statute of the United States in actions affecting employer and employee (Rule 65(e) FRCP).

For the reasons set forth, Commerce does not place "special weight" on the provisions of the Norris-LaGuardia Act (Pet. 8, n. 6). This is not a "disclaimer of reliance" but a statement of

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2. The Third Circuit reviewed the governing law and wrote: "No Supreme Court authority which has been called to our attention holds that the liability of a plaintiff who has been improperly granted an injunction is limited to the amount of the bond . . . ." 456 F.2d at 492. The Third Circuit could hardly have been unaware of *Meyers v. Block*, 120 U.S. 206, 211 (1887) (in which no bond was required), since it was cited within the authorities expressly referred to by the Court.

3. To permit comparison, the lengthy provisions of Rules 65 and 65.1 FRCP and of §107 of the Norris-LaGuardia Act are set forth in full in Appendices A and B hereto, respectively.

4. In the view of Commerce, the injunction bond limitation rule is neither expressly nor impliedly included in Rule 65. The Union argues otherwise. Commerce claims that if the "security" Congress provided by Rule 65(c) is a *statutory* limit to recovery, then Rule 65(c) is unconstitutional. Accordingly, Commerce has, pursuant to 28 U.S.C. §2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn into question.

our view that it is inconceivable that a different result should obtain whether the injunction in this labor dispute was sought under Rule 65 FRCP or §7 of the Norris-LaGuardia Act.[5]

II.

The NMU's arguments demonstrate that the error in remand is important to the administration of the labor laws.

Petitioners also seek certiorari on the grounds that the instructions of the Court of Appeals on remand clearly diverge from a recent precedent of this Court on the complex interaction of the labor laws and antitrust laws. *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975).[6] In *Connell,* this Court held that even legitimate

5. Petitioners do not suggest the elimination of the preliminary injunction from the arsenal of available judicial remedies in labor disputes or otherwise. Nor do we intend to infer that so-called "public interest" plaintiffs be held strictly liable for wrongful injunctions issued at their behest. All we urge is that this Court affirm the basic premises of Rule 65: A preliminary injunction is "by its very nature, interlocutory, tentative, provisional, *ad interim,* impermanent, mutable, not fixed, or final or conclusive, characterized by its for-the-time beingness. It serves . . . to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began." See *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F.2d 738, 742 (2d Cir. 1953). The judicially created "bond" limitation is a direct repudiation of these words since it makes "permanent" the erroneous preliminary relief and deprives a party forever of its remedy for being required to obey the plaintiffs will *pendente lite. Adolph Coors Co. v. A & S Wholesalers, Inc.,* 1977-2 CCH Trade Cases ¶61,655 (10th Cir. 1977), relied on by the Union in its Petition and Brief in Opposition, is an apt example of the misconstrued extent of the supposed rule, and in that sense actually supports the grant of certiorari herein.

6. The Union argues in footnote 13 that this case is "poles apart" from *Connell* because "nothing in the clause applied to Vantage's other vessels . . . ." That is a misstatement of fact. The challenged provision required any purchaser of an NMU vessel to assume "all of the terms and conditions" of the agreement. One of the terms was fleetwide representation. Anyway, ample proof of the NMU's purposes is obvious from its conduct. If it only wanted to "extend" its jurisdiction, it would not have sought to "restrain" the transfer, "impinging" on Vantage's wholly lawful right to increase its fleet by acquisition.

purposes would not absolve a labor union from antitrust liability for a secondary boycott. But, the opinion below proposes to remand Commerce's claim to the District Court for a determination of the NMU's purposes in effecting the boycott, which the Union claims is "essential" in order that "consideration" be "given to the nature and legitimacy of the purpose of the challenged provision." (Brief in Opp., p. 11). The NMU has, however, already had the benefit of a hearing before the NLRB, enforcement proceedings, and a full trial below, and it has not suggested any additional fact finding which could, consistent with *Connell,* in any way insulate it from liability.

In *National Woodwork Mfrs. Ass'n v. NLRB,* 386 U.S. 612 (1967), this Court held that the "touchstone" of legality under §8(e) was "whether, under all the surrounding circumstances the union's objective was the preservation of work for [the employer's] employees, or whether the agreements . . . were tactically calculated to satisfy union objectives elsewhere." *Id.* at 644-45. The Court fatefully predicted that the test would not always be simple to apply. *Ibid.* In this litigation, it has already been determined that "the NMU's motivation was to protect the Union's interest, rather than the interest of the work unit and its members." 486 F.2d at 912. (See dissenting opinion of Judge Lumbard, Pet. 21a.) By remanding for yet another determination of the Union's "objectives," the issue of "objectives" would become totally convoluted, creating a new class of secondary boycotts — those with "purposes" which are unlawful under the *National Woodwork* test, but "good" enough to save the Union from all liability. If there could be a prescription to insure another round of hot cargo clauses, this is it.

Thus, permitting this case to be remanded on "cursory, general" instructions presents a substantial risk that clear congressional intent in the adoption of §8(e) will be frustrated. As Justice Stewart wrote in *Connell:*

> "[T]he signatory of a purely voluntary agreement that violates §8(e) is fully protected from any damage that might result from the illegal 'hot cargo' agreement by his ability simply to ignore the contract provision that violates §8(e). If the union should attempt to enforce the illicit 'hot cargo' clause through any form of coercion, the employer may then bring a §303 damages suit or may file an unfair labor practice charge with the Board. See 29 U.S.C. §158(b)(4)(B). Since §8(e) provides that any prohibited agreement is 'unenforcible and void,' any union effort to invoke legal processes to compel the neutral employer to comply with his purely voluntary agreement would obviously be unavailing." 421 U.S. 649 n.9 (dissenting opinion).

This case poses the fact situation which Justice Stewart predicted could not occur. The NMU urges that unions should be entitled "in good faith" to specific enforcement of agreements arguably violative of §8(e)[7] because to do otherwise would "chill resort to arbitration and increase resort to self-help" (Brief in

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7. The NMU, possibly at the vanguard of the labor movement, argues that notwithstanding §8(e), (i) unions may make secondary boycott agreements with employers — including those who consent "in ignorance," (ii) arbitrators should grant specific performance of such agreements, and may not even hear evidence addressed to the "legality" thereof; (iii) the party to be boycotted is not entitled to notice of or representation at the arbitration; (iv) arbitral awards are enforced in proceedings under Section 301 of the LMRA, and therefore neither the employer nor the boycotted party is entitled to the protections of the Norris-LaGuardia Act in the enforcement action; and (v) should it be finally determined that the boycott was unlawful, the damaged parties should be limited to the amount of the bond (in arbitrations, usually nothing) for their relief. If this argument holds up, §8(e) might as well be declared judicially abandoned.

Opp., p. 5). That is pure bunk. "Self-help" to enforce secondary boycotts is already actionable under §303 of the LMRA, and resort to "real" arbitrations will continue to be the most effective means of resolving most labor disputes, whatever the disposition of this case. What really would be "startling and perverse" is if Congress suddenly discovered that secondary boycott agreements were not "void and unenforcible," but judicially declared merely "voidable," capable of enforcement through arbitrations, lawsuits, and threats thereof[8] until voided, and that unions are not liable for damages caused by such actions.

III.

An important issue of procedural due process is presented by this case.

The constitutional right to procedural due process in private civil litigation is not questioned by the NMU. While "due process" does not entail a rigidly fixed formula, Commerce asserts that the right implies an evidentiary hearing including sworn testimony, the opportunity to produce witnesses and documentary evidence, and to cross-examine adversary witnesses before property can be disposed of with finality. None of those elements were present in the "unusual" proceedings which resulted in the arbitral award of injunctive relief, or the preliminary injunction enforcing the award. Nonetheless, the NMU Brief in Opposition (p. 10) asserts that the petitioners' due process argument "borders on the frivolous" because "a federal

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8. Aware of the problem caused by "threats" of legal action to enforce §8(e) clauses, the General Counsel of the NLRB has urged, thus far with limited success, that such threats aimed at the collection of fines or other "punitive" damages are within the ambit of Section 8(b)(4). General Counsel's Report, 4 CCH Labor Law Rep. ¶9051, at 15288-89 (1/24/75). But, no one has focused on the problem of specific enforcement. Compare Jones, *Specific Enforcement of Hot Cargo Provisions in Collective Bargaining Agreements by Arbitration and Under Section 301(a) of the Taft-Hartley Act*, 6 UCLA L. Rev. 85 (1959), written prior to the adoption of §8(e).

court granted the time-honored remedy of preliminary injunction after notice, submission of affidavits and memoranda, hearing before the Court,[9] and participation of counsel at all stages."

This argument by the Union requires a reexamination of the pertinent facts.

On December 23, 1970, Commerce owned and operated a vessel worth $2,750,000. Exercising a wholly lawful management prerogative, and for pressing business reasons, Commerce agreed to sell the vessel and go out of the business. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 270 (1965). In making the sale, Commerce obtained an oral promise by the buyer to deal with the labor relations consequences of the transaction, a promise which to the businessmen[10] involved seemed entirely consistent with common sense notions of successorship. See *Howard Johnson Co. Inc. v. Hotel and Restaurant Employees*, 417 U.S. 249 (1974).

In an unprecedented proceeding, the NMU did *not* seek to attempt to extend its jurisdiction to the buyers's operation of the vessel, but to restrain the transfer. The Union *never* filed a statement of claim or otherwise notified Commerce or Vantage that it would seek injunctive relief.[11] Demand for such relief was

9. Rule 65 FRCP contemplates an evidentiary hearing. No such hearing was held in this case. See *Securities and Exchange Commission v. Frank*, 388 F.2d 486 (2d Cir. 1968); *Sims v. Greene*, 161 F.2d 87 (3d Cir. 1947). But see *Drywall Tapers, et al. v. Cement Masons' Int'l Ass'n*, 537 F.2d 669, 674 (2d Cir. 1976).

10. Commerce was represented in the sale by officers of its parent company with no prior experience in the industry and neither knowledge nor notice of the internecine practices of the competing maritime unions.

11. Commerce first appreciated on February 4, 1971 that Vantage would not "take care of" the NMU and immediately sought a meeting with the Union. On Friday, February 5th, the Union orally advised Commerce that it would not waive the clause, and that it would seek injunctive relief.

made without any pleading and orally only at the "meeting" with the arbitrator held on February 8th. Commerce begged for a 72-hour adjournment to bring the issues being arbitrated into focus, a request which was denied, literally at the insistence of the NMU. There is no dispute that Referee Kheel took no evidence, heard no witnesses, maintained no transcript and granted the Union everything it asked for after a 20-minute "proceeding"[12] (Record, 362-65a).

The next day, the NMU commenced the action seeking confirmation of the arbitral award, and obtained a temporary restraining order ("TRO").[13] On February 12th, Vantage filed unfair labor practice ("ULP") charges against both Commerce and the NMU, and on February 16th, Vantage moved to intervene in the District Court proceedings. After full argument, District Judge Wyatt determined to permit Vantage's intervention and to dissolve the TRO on the grounds that enforcement of the NMU restraint-on-transfer clause raised "a serious question" of antitrust violation; but Judge Wyatt did not grant the application to vacate the arbitral award of injunctive relief because the NMU motion to confirm such award was on the calendar for February 23rd, as it happened before Judge Frankel.[14]

12. To assert, as the Union does, that there was no need for a hearing because Commerce admitted it had contracted to sell the vessel without securing the NMU undertaking, is outrageous. A hearing before Referee Kheel would have eliminated the District Court's subsequent "guesswork" as to the circumstances of the sale, and exposed the unusual history of the restraint-on-transfer clause, a history which the Union counsel sought to hide up to and including at the trial of this action. See Appendix C hereto, 6a, 32a.

13. We reiterate that the NMU did not notify Vantage, a party actually named in the arbitration award (Record, 4a), Commerce, or the attorney known by them to be Commerce's principal counsel, of the application for the TRO. Attorney Simon, who was notified, made no argument or other presentation to Judge Wyatt (Record, 366a).

14. Judge Wyatt's order was signed the night of Monday, February 22nd, with all parties then before him. The Union could have addressed its "preliminary injunction" motion to Judge Wyatt, who had already heard arguments relevant thereto, but chose instead to present it to a different federal judge, obviously for a "second" chance at the injunctive relief it needed in order to avoid submitting the controversy to the NLRB.

The NMU's counsel then submitted an affidavit "in support of plaintiff's motion for a preliminary injunction." No such motion had been previously noticed,[15] and this "procedural impropriety" was to complicate the events which followed.

All counsel appeared before Judge Frankel on the morning of February 23rd. Before there was any argument, Judge Frankel made an offer to disqualify himself in the proceedings on the grounds that he had previously represented employers in the industry. Commerce's counsel stated that he wanted to consider the issue, and the matter was put to the end of Judge Frankel's calendar. Commerce decided not to seek disqualification,[16] but to urge the Court to refer the matter back to Judge Wyatt, a request which Judge Frankel rejected.

In the late afternoon of February 23, 1971, the NMU "motions" came to be heard by Judge Frankel in unrecorded oral argument.[17] Concededly, all sides had an opportunity to argue, but neither side had any opportunity to present witnesses

15. The notice required by Rule 65(a) implies a hearing in which the defendant is given the opportunity to oppose the application and prepare for such opposition. *Granny Goose, supra,* 415 U.S. at 434 n. 7; *Klaus v. Hi-Shear Corporation,* 528 F.2d 225, 235 (9th Cir. 1975). The burden was on the NMU to demonstrate its entitlement to injunctive relief. *North American Coal Corp. v. Local Union 2262,* 497 F.2d 459, 465 (6th Cir. 1974).

16. At the time, Commerce did not know, and fully trusts that Judge Frankel did not know, that the restraint-on-transfer clause had been privately agreed to by Mr. Edward Silver, a personal friend and former law partner of the District Judge. In the District Court, Commerce affirmatively asserted that it did not claim any ethical impropriety in Judge Frankel's hearing the original motion to confirm, but offered to prove that he would not have been an "unbiased" judge for a full trial (Record, 1304-06a).

17. In response to footnote 11 in the Brief in Opposition, Commerce does not deny that on oral argument it stipulated that Judge Frankel "might treat the motion as one for a preliminary injunction," but does deny that that stipulation in any way whatsoever constituted an "acquiescence" to the relief, or the Union's improper procedures which were, in fact, vigorously protested.

or cross-examine witnesses. The NMU told its side of the story to Judge Frankel in an affidavit served less than twenty-four hours earlier. Neither Commerce nor Vantage had any opportunity to respond to the NMU papers, or to cross-examine the NMU's affiant.[18] In fact, neither company put in further papers at that time. The NMU says that the companies' submission of lengthy affidavits and briefs on the motion before Judge Wyatt cures the abuse of procedural fair play which occurred in the application for a preliminary injunction. That argument has, under similar circumstances, been directly rejected by this Court. *Granny Goose Foods Inc., supra,* 415 U.S. 423, 442.

On the basis of the NMU's counsel's unanswered affidavit and without the benefit of an evidentiary hearing, Judge Frankel wrote a blistering opinion[19] granting the NMU a preliminary injunction, although postponing for "reasons of at least a technical nature" a formally final decision of the motion to confirm the arbitrator's award of injunctive relief. Judge Frankel indicated that once Vantage's answer was filed (it had been filed

18. What, for example, would the NMU have said if it were asked to produce Commerce's agreement to the restraint-on-transfer clause? That it was lost, but that every other company had signed? (Appendix C, 7a). Then, what would the NMU have said if it were asked to produce the other companies' agreements which it allegedly had? (Appendix C, 12a). That they were discarded? (Appendix C, 23a). Or, would it finally have admitted that in fact "nobody . . . was asked to sign Article I, Section 2" (Appendix C, 27a), but that it was "due to an oversight" (Appendix C. 29a). We categorically state that if there had been an evidentiary hearing before Referee Kheel, as requested by Commerce, Judge Frankel never would have written the opinion granting the preliminary injunction (Appendix C, 32a). The denial of due process was the direct cause of the harm.

19. In footnote 12 of the Brief in Opposition, the NMU "emphatically disagrees" with our assertion that Judge Frankel's "characterization of the conduct and motives of the companies was later proven to be unfounded." Judge Frankel's decision was rendered on March 2, 1971. In the six years since the *preliminary* ruling, there have been three evidentiary trials relating to this dispute, and not a single tribunal has adopted Judge Frankel's "assessment" of

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on March 1st), he was prepared to confirm the arbitral award.[20] Commerce expressly raised and never waived the due process arguments arising from the total lack of a hearing prior to the arbitral award of injuction. Judge Frankel gave "short shrift" to these arguments terming them "mere quibbles" as to the arbitrator's procedure. This constitutional issue cannot possibly evaporate because Commerce "had counsel" or because such counsel raised arguments which were summarily rejected by the District Court without evidence in a preliminary determination, later reversed.

It is difficult to see how the Union finds comfort in the holding in *Brault v. Town of Milton,* 527 F.2d 730 (2d Cir. 1975)[21] in which Judge Mansfield wrote:

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the facts. [See *McLeod v. National Maritime Union,* 329 F. Supp. 151 (S.D.N.Y. 1971), *rev'd,* 457 F.2d 1127 (2d Cir. 1972); *Commerce Tankers Corp.,* 196 N.L.R.B. No. 165 (1972), *enf'd sub nom. NLRB v. National Maritime Union,* 486 F.2d 907 (2d Cir. 1973), *cert. denied,* 416 U.S. 970 (1974); and the decision of District Judge Griesa reprinted in the petition, particularly 46a-48a.] Only the Union's total disregard for "due process" permits it to adhere in a brief to factual allegations which it has never supported with witnesses or evidence. There is nothing in the record which supports the Union's ugly inferences, unfortunately accepted by Judge Frankel, that Commerce knowingly and deliberately violated an obligation it recognized or participated in any kind of conspiracy to secretly transfer the vessel to the NMU's competitor union.

20. Thus, if an expedited appeal of the preliminary injunction was sought prior to action by the General Counsel on the ULP charges, the practical advantage of any such appeal might well have been mooted overnight by confirmation of the arbitral award. In light of the strong language in Judge Frankel's opinion, appeal prior to a development of the true factual record was unlikely to be successful; if successful, it would not necessarily win Commerce the practical relief required; and in either event, further federal court proceedings would engender delay by the NLRB, the agency charged with *exclusive* jurisdiction over such matters. Faced with that circumstance, Commerce urgently and continuously pressed the General Counsel to institute ULP charges.

21. The Union's only other authority, *Gryger v. Burke,* 334 U.S. 328, 331 (1948) is a clearly inapplicable and outdated holding that due process does not require a state to provide counsel to defendants who plead guilty to non-capital offenses.

> "The Court's function is to assure that no party will be deprived of property without satisfying the fundamentals of due process, including the requirement that the defendant be furnished with notice and a statement of the claim against him and the opportunity to prepare and present a defense, a hearing, the right to confront and cross-examine witnesses and findings." 527 F.2d at 738-39.

Our argument, plain and simple, is that these elements were obviously denied to Commerce at the Kheel arbitration, and in no way cured (and in some ways complicated) by the Union's shortcuts in the District Court. The grant of "preliminary" relief under such circumstances *may* not have been contrary to the constitutional requirements; but the imposition of the Union's "security" deposit as a "permanent limit" to the companies recovery would be an intolerable and inexplicable reversal of the most basic notions of fundamental fairness, and cries out for review by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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